No. 07-110
Title: Avron J. Arave, Warden, Petitioner
v.
Maxwell Hoffman
Docketed: July 30, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-99004)
Decision Date: July 5, 2006
Rehearing Denied: March 6, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 25 2007	Application (06A1126) to extend the time to file a petition for a writ of certiorari from June 4, 2007 to August 3, 2007, submitted to Justice Kennedy.
May 31 2007	Application (06A1126) granted by Justice Kennedy extending the time to file until July 19, 2007.
Jul 9 2007	Application (06A1126) to extend further the time from July 19, 2007 to July 26, 2007, submitted to Justice Kennedy.
Jul 17 2007	Application (06A1126) granted by Justice Kennedy extending the time to file until July 26, 2007.
Jul 26 2007	Petition for a writ of certiorari filed. (Response due August 29, 2007)
Aug 29 2007	Order extending time to file response to petition to and including September 28, 2007.
Sep 28 2007	Brief of respondent Maxwell Hoffman in opposition filed.
Sep 28 2007	Motion for leave to proceed in forma pauperis filed by respondent Maxwell Hoffman.
Oct 10 2007	DISTRIBUTED for Conference of October 26, 2007.
Oct 12 2007	Reply of petitioner Avron J. Arave, Warden filed. (Distributed)
Oct 29 2007	DISTRIBUTED for Conference of November 2, 2007.
Nov 5 2007	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 5 2007	Petition GRANTED. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"
Nov 29 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 28, 2007.
Nov 30 2007	Brief amicus curiae of Wayne County, Michigan filed.
Dec 3 2007	Motion to vacate the decision below and dismiss as moot filed by respondent Maxwell Hoffman .
Dec 6 2007	Response of petitioner Avron J. Arave, Warden to respondent's motion to dismiss and vacate filed.
Dec 10 2007	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including January 11, 2008.
Dec 12 2007	DISTRIBUTED for Conference of January 4, 2008.
Jan 7 2008	Motion to vacate the decision below and dismiss as moot GRANTED.
Jan 7 2008	Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Feb 8 2008	JUDGMENT ISSUED.

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FILED

07-110 JUL 26 2007

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MAXWELL HOFFMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Five weeks before his trial, Respondent Maxwell Hoffman rejected an offer by the state to recommend a life sentence if he would plead guilty to first-degree murder. Hoffman's attorney, William Wellman, recommended Hoffman reject the offer because the Ninth Circuit had earlier determined the Constitution required juries to find statutory aggravating factors, while in Idaho, judges made such findings. Wellman believed if Hoffman received a death sentence it would be reversed on appeal. However, in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court determined the Constitution permits judges to find statutory aggravating factors. Nevertheless, the Ninth Circuit determined Wellman's representation was ineffective during plea negotiations because he "based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little." The Ninth Circuit also concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement," but "a misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him."

1. Because the Ninth Circuit did not require Hoffman to prove Wellman's recommendation constituted "gross error" and mandated Wellman "be prescient about the direction the law will take," did the Ninth Circuit err by rejecting this Court's prohibition regarding the use of hindsight to conclude Hoffman established deficient performance?

QUESTIONS PRESENTED – Continued

2. Because Hoffman failed to allege he would have accepted the state's plea offer but for Wellman's advice and the Ninth Circuit determined Hoffman's decision to reject the offer was not a "principled stand," did the Ninth Circuit err by concluding Hoffman established prejudice?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Attorney General for the State of Idaho, on behalf of A. J. Arave, Warden of the Idaho Maximum Security Institution, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which overturned an eighteen-year-old first-degree murder conviction based upon an allegation of ineffective assistance of counsel stemming from counsel's recommendation to reject a plea offer that Hoffman rejected irrespective of counsel's recommendation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App., *infra*, at 1-37, is reported at *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006). The Ninth Circuit's Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc and the dissenting opinion from that Order, App., *infra*, at 66-74, is reported at *Hoffman v. Arave*, 481 F.3d 686 (9th Cir. 2007).

JURISDICTION

The opinion of the Ninth Circuit was filed July 5, 2006. (App. 1.) On March 6, 2007, the Ninth Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. App. 66. Petitioner requested and received two extensions of time to file his Petition for Writ of Certiorari, to and including July 26, 2007. This case

arose under 28 U.S.C. § 2254 and Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The facts leading to Hoffman's conviction for Denise Williams's first-degree murder and his death sentence are summarized in *State v. Hoffman*, 851 P.2d 934, 935-37 (1993):

> [O]n September 10, 1987, Denise Williams (Williams), a confidential informant working for Nampa narcotic officers, made a controlled drug buy from Richard Holmes (Holmes) which resulted in the arrest of Holmes. During the arrest it became apparent that Williams was working

for the police. Holmes was subsequently released from custody on bail.

Upon Holmes' release, Sam Longstreet, Jr. (Longstreet) and James Slawson (Slawson) arranged for a meeting with Holmes. Longstreet and Slawson, who were responsible for introducing Williams to Holmes for the purpose of purchasing drugs, testified that they met with Holmes in an effort to assure him that they had nothing to do with his arrest. They further testified that when they arrived at Holmes' residence, two other men, defendant Hoffman and Ronald Wages (Wages), were present. Both Wages and Hoffman worked for Holmes as part of his drug operation, and both men were heavy drug users themselves. During this meeting, outside the presence of Hoffman and Wages, Holmes asked Longstreet and Slawson if they would kill Williams for her involvement in his arrest and to prevent her from testifying at Holmes' preliminary hearing on drug charges. Longstreet and Slawson stated that they were incapable of killing Williams but would help in other ways. In response, Holmes' [sic] stated that if it were up to him he would cut Williams' throat and "let her bleed like an animal."

The next day, Longstreet and Slawson returned to Holmes' house. Hoffman and Wages were again present. Holmes had Hoffman conduct a strip search of Longstreet and Slawson to ensure that they were not wired and working for the police. During this meeting, an agreement was reached between Holmes, Longstreet and Slawson wherein Longstreet and Slawson were to kidnap Williams and take her to a spot in Owyhee County known as the Boy Scout Camp. Holmes, Wages, Longstreet and Slawson then

drove to the Boy Scout Camp where they planned the details of the kidnapping. It was agreed that Longstreet and Slawson would call Holmes once they had kidnapped Williams and that Wages would be waiting at the camp when they arrived. It was also agreed that Williams was to be tied up to a tree in the area until Holmes arrived.

The following evening, Holmes and Hoffman took Wages to the Boy Scout Camp where they all ingested drugs. Holmes and Hoffman then left, leaving Wages at the Camp. Longstreet and Slawson arrived at the camp sometime later with Williams. Longstreet testified that he and Slawson tricked Williams into going with them by telling her that they would take her to buy alcohol. The three drove around drinking and ingesting drugs, stopping only once to allow Longstreet to call Holmes and leave a message that he had Williams. Longstreet and Slawson then pretended to get lost and eventually made their way to the Boy Scout Camp as was earlier planned. Upon their arrival at the camp, Wages, who was wearing a bandanna and carrying a sawed off shotgun, ordered Longstreet and Slawson to strip Williams of her clothes and to tie her up. The two men complied with Wages' order. Longstreet and Slawson then left the camp, leaving Williams with Wages.

Hoffman arrived at the camp a short time later. Hoffman and Wages loaded Williams into a car and met Holmes at the old ION highway cut-off. Holmes kicked Williams in the head and told her she was "a dead bitch." Holmes left and subsequently returned in a brown Nissan four-wheel drive and told Hoffman and Wages, "You know what to do." Holmes then left again.

Hoffman and Wages then took Williams in the Nissan. After driving around for several hours they stopped the vehicle in Delamar, Idaho. Wages and Hoffman instructed Williams to write two letters to the press, which were intended to exonerate Holmes of the drug charges. After the letters were written, Williams was taken to a cave outside of Silver City, Idaho. Hoffman took Williams into the cave and slashed her throat with a knife. As Hoffman was returning to the vehicle, Wages spotted Williams crawling up an embankment near the cave. Wages then pursued Williams and stabbed her under the arm with Hoffman's knife. Thinking Williams was dead, both men buried her with rocks. It would later be determined that the cause of death was a crushing blow by a rock to William's [sic] head.

Upon William's [sic] disappearance, a police investigation ensued. Eventually, Longstreet and Slawson agreed to provide the police with information regarding William's [sic] disappearance in exchange for a recommendation of a year in jail for kidnapping. Based on this information, Holmes and Wages were indicted on charges of conspiracy to commit murder. In an effort to secure a plea agreement, Holmes led the police to Williams' body. The conspiracy charges against Holmes were vacated, but Holmes was subsequently charged with aiding and abetting first degree murder on August 22, 1988.

After Williams' body was found, Wages confessed to the killing and became a cooperative witness for the state and agreed to give a full account of how it occurred.

On August 22, 1988, the day Hoffman was charged, William Wellman was appointed to represent Hoffman. App. at 3. Trial commenced March 7, 1989, after which Hoffman was found guilty of Denise's first-degree murder. App. at 4.

Prior to trial, on December 22, 1988, the Ninth Circuit issued *Adamson v. Ricketts*, 865 F.2d 1011, 1023-29 (9th Cir. 1988), concluding Arizona's use of judges to find statutory aggravating factors was unconstitutional. App. at 24. At the time of Hoffman's trial, Idaho, like Arizona, used judge sentencing; the two states' capital sentencing procedures were "virtually identical," *State v. Charboneau*, 774 P.2d 299, 326 (Idaho 1989) (Huntley, J., concurring and dissenting), a fact recognized by Wellman. App. at 24.

On February 6, 1989, the state extended Hoffman a plea offer, which expired on February 16, 1989, agreeing to withdraw the death penalty if he pled guilty to first-degree murder. App. at 24. Wellman recommended Hoffman reject the offer because he did not believe Hoffman was "giving up a lot by going to trial because [he] didn't think there was a reasonable probability that one, Judge Weston would impose the death sentence, and two, that a death sentence would be upheld given my reading of *Adamson* and my knowledge that *Adamson* was reversed before Max went to sentencing." App. at 81. Wellman explained the risk of not taking the offer, but Hoffman rejected it, stating, "I am not going to take it. I will take my chances." App. at 83. Hoffman was convicted of first-degree murder and sentenced to death. App. at 5. The Idaho Supreme Court affirmed Hoffman's conviction and sentence. *Hoffman*, 851 P.2d 934.

Hoffman filed a Petition for Writ of Habeas Corpus, which the district court denied. App. at 5. Pursuant to the procedural default doctrine, the district court dismissed a number of claims, including Hoffman's ineffective assistance of counsel claims. App. at 5; *see also Hoffman v. Arave*, 937 F.Supp. 1152 (D. Idaho 1997). Hoffman's remaining claims were subsequently dismissed by the district court on the merits. App. at 5; *see also Hoffman v. Arave*, 73 F.Supp.2d 1192 (D. Idaho 1998).

While the Ninth Circuit affirmed most of the district court's opinion, it concluded Hoffman's ineffective assistance of counsel claims were not procedurally defaulted and remanded for an evidentiary hearing. *Hoffman v. Arave*, 236 F.3d 523, 530-36 (9th Cir. 2001), *cert. denied*, *Arave v. Hoffman*, 534 U.S. 944 (2001).[1]

After an evidentiary hearing, the district court granted Hoffman habeas relief based on ineffective assistance at sentencing and the violation of his Sixth Amendment right to counsel during the presentence interview, but denied relief based upon ineffective assistance during plea negotiations and trial. App. at 38-65. Both parties initially filed appeals. App. at 7. However, Petitioner subsequently withdrew his cross-appeal regarding sentencing-phase ineffective assistance of counsel claims, leaving only Hoffman's appeal before the Ninth Circuit regarding guilt-phase ineffective assistance of counsel claims. App. at 7.

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[1] The Ninth Circuit also concluded Hoffman's Sixth Amendment right to counsel was violated during his presentence interview and remanded for an evidentiary hearing to determine whether the error was harmless. App. at 5; *see also Hoffman*, 236 F.3d at 540-41.

On July 5, 2006, a Ninth Circuit panel affirmed in part and reversed in part. The panel affirmed the district court's denial of habeas relief based upon counsel's alleged failure to investigate and present a diminished capacity defense and counsel's alleged failure to challenge Hoffman's competency. App. at 9-23. However, the panel granted relief based upon Hoffman's claim that he was denied effective assistance during plea negotiations when Wellman recommended Hoffman reject the state's offer. App. at 23-32. Addressing deficient performance, the panel concluded, "Wellman based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little." App. at 27. The panel also concluded Hoffman established prejudice because, "had Wellman fully presented Hoffman's options and told Hoffman that he was giving up very little in exchange for the security of the death penalty being off the table, Hoffman **probably** would have gone along with Wellman's suggestion and would have accepted the plea agreement." App. at 30 (emphasis added). Rejecting Petitioner's assertion that, regardless of Wellman's advice, Hoffman would not have taken the plea agreement because he wanted the state to prove he was guilty of first-degree murder, the panel opined, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement. Rather, Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him." App. at 31. The panel ordered Hoffman's release unless "the State offers Hoffman a plea agreement with the 'same material terms' offered in the original plea agreement." App. at 31-32.

On March 6, 2007, the state's Petition for Rehearing with Suggestion for Rehearing En Banc was denied, failing to receive a majority of votes of the active judges in favor of en banc rehearing. App. at 66. However, seven judges joined in dissenting from the panel's decision, concluding, "not only does the panel find deficient performance in an attorney's failure to correctly predict future court decisions (the Crystal Ball Rule), the panel finds prejudice in a mere supposition by this court that the defendant would have taken the plea had his attorney guessed correctly." App. at 74.

REASONS FOR GRANTING THE PETITION

In this habeas proceeding, the Ninth Circuit adopted a standard, not supported by this Court's precedents and in conflict with the rulings of other circuits, that greatly reduces the standard defendants must meet to establish ineffective assistance of counsel relating to plea negotiations. As recognized by the dissenting judges, the panel's conclusion, that Wellman's recommendation was based upon incomplete research and "that his client risk[ed] much in exchange for very little," App. at 27:

> open[s] this court up to a cavalcade of challenges. Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the court's constitutional holdings, has a claim of deficient performance. And yet, how often does an attorney give advice that does not in some way predict future court action?

App. at 69-70.

As further recognized by the dissenting judges, App. at 70-74, the panel's decision ignores the pleading requirements established by this Court in *Hill v. Lockhart*, 474 U.S. 52, 60 (1985), significantly reduced Hoffman's burden of establishing he would have pled guilty if Wellman had offered different advice, and establishes a new requirement that Hoffman's rejection of the state's offer be based upon a "principled stand."

This Court admonished against this very result in *Strickland v. Washington*, 466 U.S. 668, 697 (1984), when it recognized, "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."

A. To Establish Deficient Performance, Hoffman Was Required To Establish Wellman's Recommendation Constituted Gross Error, Without The Distorting Effects Of Hindsight

While this Court has never expressly stated plea negotiations are a "critical stage" at which the Sixth Amendment right to counsel adheres, the Court has explained entry of a guilty plea, whether a misdemeanor or felony "ranks as a 'critical stage' at which the Sixth Amendment right to counsel adheres." *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). Additionally, this Court implicitly concluded pretrial plea negotiations are a critical stage in *Burger v. Kemp*, 483 U.S. 776, 803 (1987) ("The separate trials in this case, however, did absolutely nothing to reduce the potential for divergence of interests at the two critical stages that petitioner argues were adversely affected by the conflict of interest, that is, pretrial plea negotiations and post-trial appeal").

This Court has further held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. Deficient performance is not based upon "whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *see also Hill*, 474 U.S. at 58-59 ("In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competency already set forth in *Tollet v. Henderson* [411 U.S. 258 (1973)], and *McMann v. Richardson*"). This is an objective standard protected by a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702 (2002). In the context of recommending a client plead guilty, when the client is informed of the plea offer, the defendant "must demonstrate gross error on the part of counsel." *McMann*, 397 U.S. at 772; *see also Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir. 2002); *Wade v. California*, 450 F.2d 726, 732 (9th Cir. 1971); *Long v. Brewer*, 667 F.2d 742, 745-46 (8th Cir. 1982) (quoting *McMann*, 397 U.S. at 772).

The panel did not even cite *McMann*, *Hill* or the "gross error" standard, let alone determine whether Wellman's advice constituted "gross error." Rather, the panel merely opined Wellman's research was "incomplete" and that his recommendation required "his client risk much in exchange for very little." App. at 27.

The panel's conclusion regarding Wellman's research relies upon impermissible hindsight. As recently reaffirmed in *Bell*, 535 U.S. at 698 (quoting *Strickland*, 466 U.S. at 689), "[j]udicial scrutiny of a counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Detailing the procedural history of *Adamson* and *State v. Walton*, 769 P.2d 1017 (Ariz. 1989), the panel concluded Wellman's performance was deficient because he did not understand the "general landscape in which [*Adamson*] arose." App. at 27. While the panel noted Wellman was aware Idaho's courts had "considered and consistently rejected claims similar to *Adamson*," App. at 27-28, the panel lost sight of the fact that the Idaho cases cited by the panel were decided prior to the Ninth Circuit's decision in *Adamson*. Undoubtedly, Wellman was aware of Idaho's prior rejection of arguments similar to those adopted in *Adamson*, and also knew "that a pair of cases was well on its way to the Idaho Supreme Court that would challenge the continuing viability of these Idaho Supreme Court cases in light of [the Ninth Circuit's] holding in *Adamson*." App. at 27. However, Wellman had no basis for relying upon pre-*Adamson* decisions or believing the Idaho Supreme Court would not follow *Adamson* until after it was rejected by the Idaho Supreme Court on April 4, 1989, in *Charboneau*, 774 P.2d at 146-47, nearly two months after the expiration of the state's offer. This is particularly true in light of the Ninth Circuit's conclusion regarding the binding nature of its decisions upon the respective states. *See Yniquez v. Arizona*, 939 F.2d 727,

736 (9th Cir. 1991) (expressing "serious doubts" regarding the "view that the state courts are free to ignore decisions of the lower federal courts on federal questions").

The panel's discussion of the procedural history of *Walton* is likewise unavailing. App. at 27-28. First, counsel is not expected to research the law in other jurisdictions. *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981) ("counsel is normally not expected to . . . research parallel jurisdictions"). More importantly, while Arizona may have signaled its intention to appeal *Adamson*, Wellman was not required to guess whether the United States Supreme Court would grant certiorari in either *Adamson* or *Walton*.

As recognized by the dissenting judges, "*Adamson* was good law while the plea bargain was available. The Idaho Supreme Court had not rejected our *Adamson* position, and, in a pre-AEDPA world, our decision would have made federal habeas relief for Hoffman likely." App. at 69. Contrary to the panel's conclusion regarding the necessity of researching the "general landscape" in which a case arose, Wellman's advice was not objectively unreasonable "while the law was still unsettled." *Jones v. United States*, 224 F.3d 1251, 1257-58 (11th Cir. 2000). In fact, the Supreme Court refused to grant certiorari in *Adamson*, even after granting certiorari in *Walton*. *See Lewis v. Adamson*, 497 U.S. 1031 (1990); *Walton v. Arizona*, 493 U.S. 808 (1989). More significantly, Wellman was not required to guess the Supreme Court would affirm the constitutionality of Arizona's sentencing scheme in *Walton v. Arizona*, 497 U.S. 639 (1990). In fact, twenty-two years after *Walton*, the Supreme Court reversed its decision and concluded juries must find statutory aggravating factors. *Ring v. Arizona*, 536 U.S. 584 (2002). Based upon *Ring*, even if Wellman had conducted the additional research

advocated by the panel, it was just as likely, at that time, the Supreme Court would have reversed the Arizona Supreme Court in *Walton*, and Wellman's conclusions that Idaho's capital statutory sentencing scheme was unconstitutional would have been validated.

Numerous circuits have addressed similar situations and determined counsel are not required to guess what may happen regarding future court decisions. In *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1539 (10th Cir. 1995), the defendant challenged his attorney's failure to seek a continuance after the district court made statements about a forthcoming change in the law, mandated by a circuit opinion, that would effect his sentence. The court recognized, "Counsel's assistance is not ineffective simply because counsel fails to base its decisions on laws that might be passed in the future" and that the courts must "distinguish the failure of an attorney to be aware of prior **controlling precedent** – which might render counsel's assistance ineffective – from the failure of an attorney to foresee future developments in the law." *Id.* at 1542 (emphasis added).

In *Fountain v. Kyler*, 420 F.3d 267, 270-71 (3rd Cir. 2005), the court refused to find ineffective assistance based upon erroneous advice not to file an appeal when the attorney believed a newly enacted statute would be applied retroactively subjecting her client to the death penalty. The court recognized it "must judge the reasonableness of [counsel's] conduct based on the law and the facts as they were known in January 1980." *Id.* at 275; *see also Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) ("Counsel was not required to predict accurately how the Oregon courts would resolve the question whether the evidence was legally sufficient to support a conviction

for aggravated murder if the matter had gone to trial"); *Lowry v. Lewis*, 21 F.3d 344, 356 (9th Cir. 1994) (counsel "cannot be required to anticipate our decision in this later case, because his conduct must be evaluated for purposes of the performance standard of *Strickland* 'as of the time of counsel's conduct' "); *United States v. Harms*, 371 F.3d 1208, 1211-12 (10th Cir. 2004) (counsel's failure to anticipate the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), was not ineffective); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (quoting *Gonzalez-Lerma*, 71 F.3d at 1542) ("we have rejected ineffective assistance claims where a defendant faults his former counsel not for failing to find existing law, but for failing to predict future law and have warned 'that clairvoyance is not a required attribute of effective representation' ").

While at the time the plea offer was available *Adamson* was clearly good law upon which Wellman could objectively base his recommendation that Hoffman reject the state's plea offer, the panel inexplicably concluded, "If there was a high probability that Hoffman was not going to receive the death penalty, Wellman might have been reasonable in considering our decision in *Adamson* as an additional reason to reject the plea agreement." App. at 28. It is incomprehensible that *Adamson* is "good law" if there was not a "high probability Hoffman was going to receive the death penalty," but "bad law" if there was a high probability he would receive the death penalty. Presumably, this constitutes the basis for the panel's conclusion that Wellman's performance was deficient because "his client risk[ed] much in exchange for very little." App. at 27. However, no jurisdiction has required an attorney to assess the validity of a federal circuit case based upon the

degree of risks associated with receiving a particular sentence. This is particularly true in Hoffman's case because Wellman "didn't think there was a reasonable probability . . . Judge Weston would impose the death sentence," App. at 81, since Hoffman's co-defendant, Ronald Wages, did not receive the death penalty and Wellman was defending Hoffman on an "aiding and abetting" principle to reduce his culpability.

By requiring counsel to "be prescient about the direction the law will take," App. at 26, the panel violated one of the standard principles of ineffective assistance of counsel, which prohibits the courts from examining such claims under the distorting effects of hindsight by requiring counsel to guess what direction the courts will go when examining new or expanded issues that are placed before them. This is such a marked departure from *Strickland* and its progeny that certiorari is required to prevent a flood of ineffective assistance of counsel claims that will be based upon inadequate legal research because counsel was not "prescient about the direction the law will take," App. at 26, a requirement clearly not mandated by *Strickland* or its progeny.

B. To Establish Prejudice, Hoffman Must Allege And Prove, Based Upon A Reasonable Probability, He Would Have Accepted The State's Offer But For Wellman's Actions

Not only does Hoffman have the burden of establishing deficient performance, he must establish prejudice, which requires him to prove "there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded guilty." *Hill*, 474 U.S. at 59. The starting point for determining prejudice is whether Hoffman affirmatively

alleged he would have pled guilty if not for Wellman's actions. In *Hill*, the Supreme Court declined to decide whether there was ineffective assistance of counsel because:

> Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.

Id. at 371.

As recognized by the dissenting judges, App. at 72-73, Hoffman has never alleged he would have pled guilty but for Wellman's actions. Rather, in Hoffman's Second Amended Petition for Writ of Habeas Corpus, his attorney merely alleged:

> Had [Hoffman] been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood petitioner's mental state including his brain damage, dyslexia, mental illness including psychosis, and mental retardation, counsel could have secured to [Hoffman] adequate care and treatment that would have rendered [Hoffman] sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

App. at 105.

This does not constitute the type of affirmation required to establish Hoffman would have pled guilty but for Wellman's actions. Hoffman did not even sign the

Second Amended Petition; it was signed only by his attorney. App. at 131. Neither has Hoffman submitted affidavits or testified he would have accepted the plea offer. Even the panel merely assumed Hoffman will accept the plea agreement. App. at 34 ("Given our holding above, Hoffman will almost certainly not be subject to the death penalty, **assuming** he accepts the plea agreement") (emphasis added). As recognized by the dissenting judges, based upon the manner in which Hoffman pled his claim regarding plea negotiations, "there is no causal connection between Wellman's supposedly ineffective assistance in predicting constitutional law and Hoffman's refusal to plead guilty." App. at 73.

While there is evidence Hoffman "had a 'compliant personality,' and would frequently defer to Wellman's decision-making," App. at 30, that alone is insufficient for Hoffman to meet his burden of affirmatively alleging and proving prejudice.[2] First, Hoffman has never affirmatively stated he would accept the state's offer. Second, Wellman testified Hoffman rejected the state's offer irrespective of his advice. At the federal evidentiary hearing, while Wellman was being pressed regarding whether he recommended Hoffman reject the state's offer, the following questioning occurred:

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[2] Considering the number of times Hoffman has moved to withdraw his appeals, discharge various attorneys and then have his appeals and attorneys reinstated, *Hoffman*, 236 F.3d 529 n.6, the conclusion that Hoffman "probably would have gone along with Wellman's suggestion and would have accepted the plea agreement," App. at 30, is on a dubious foundation.

Q. Would it be fair Mr. Wellman, to state that Mr. Hoffman was going to reject that plea agreement because he was a con's con, irrespective of what your recommendation was?

A. Well, I don't think there is any question, Mr. Anderson, that **Max, in my opinion, saw his best procedure to require the State to prove those matters against him**. I think he had a sense of – you know, I would describe that he was of the old school. He was not, he was not going to snitch on anybody, he was not going to turn on anybody. **And if the State charged him, then they needed to prove it.**

Now, I can't tell you whether if in all of his previous criminal proceedings that he went to trial on each and every one of those. I don't know that he did. But –

Q. But as far as this case?

A. I think the whole odd nature of these events, and I go back to the point in time when Denise disappeared and the Nampa police and the Canyon County prosecutor brought the indictments against Wages and Holmes and Max was dodging the charging, that he perceived himself as being out of the circle and was really a bit surprised that he got drawn into the circle. **And he needed to see the evidence that the state had in order to satisfy his mind or convince him that yeah, maybe there was a case here.**

I don't know. All I can tell you is that Max was there, I think I explained to him the risk of

> not taking and **he said, "I am not going to take it. I will take my chances."**

App. at 82-83 (emphasis added).[3]

Rejecting the state's argument that Hoffman declined the state's offer irrespective of Wellman's advice, the panel concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement. Rather, Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him." App. at 31. Whether Hoffman's decision was a "principled stand" is entirely irrelevant.

The Supreme Court has reaffirmed the fundamental principle that the ultimate decision to plead guilty must be left to the defendant. In *Florida v. Nixon*, 543 U.S. 175, 181 (2004), counsel embarked on a defense to concede guilt at trial preserving his credibility in urging leniency during the penalty phase. The Court reviewed the duties of counsel and reaffirmed:

> [C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.

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[3] Because the state respectively disagrees with the panel's opinion that the state has "pull[ed] Wellman's testimony out of context," App. at 31, the entirety of the cross-examination of Wellman regarding plea negotiations is attached to this petition. App. at 78-83.

Id. at 187 (internal quotations and citations omitted). The Court further explained, "While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction and the high stakes for the defendant require the utmost solicitude." *Id.* (internal quotations and citations omitted). As explained by the dissenting judges, "Requiring a 'principled stand' to validate a refusal to enter a plea agreement hardly demonstrates 'the utmost solicitude' for a defendant's choice. To the contrary, it creates a barrier to effective pleading out." App. at 71.

The federal circuits have also recognized the sanctity of a defendant's "ultimate decision" to plead guilty or reject a plea offer and proceed to trial. In *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003), the court rejected an ineffective assistance claim based upon his attorney's failure to "insist" the defendant accept a plea offer, explaining:

> The decision to plead guilty – first, last, and always – rests with the defendant, not his lawyer. Although the attorney may provide an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction.

See also Nunes v. Mueller, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the ultimate authority remains with the defendant 'to make certain fundamental decisions regarding the case, as to whether to plead guilty' "); *Purdy v. United States*, 208

F.3d 41, 45 (2nd Cir. 2000) ("the ultimate decision whether to plead guilty must be made by the defendant").

While Hoffman's decision may not have been "principled," it was his decision, and the panel was not permitted to second-guess the reasons for that decision and force him to accept a plea agreement without the state being required to prove its case. The panel's conclusion, "Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him," App. at 31, does not change the analysis. Defendants often misunderstand the nuances of criminal law and procedure, particularly with regard to aiding and abetting liability. However, there is no allegation Wellman failed to explain the principle to Hoffman or that his explanation was deficient. Rather, the panel concluded:

> Had Hoffman been presented with an accurate evaluation (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea.

App. at 31.

The panel failed to explain how, if these three sentencing issues had been explained to Hoffman, they would have illuminated his understanding of aiding and abetting liability, the reason determined by the panel for Hoffman's "[un]principled stand against accepting a plea agreement." App. at 31.

Because Hoffman has failed to **allege** he would have accepted the plea agreement and failed to **provide** sufficient evidence he would have accepted the plea agreement irrespective of Wellman's recommendation, Hoffman has failed to establish prejudice based upon the dictates in *Strickland* and *Hill*. By virtually eliminating the *Hill* pleading requirements, reducing the bar for deficient performance and requiring the prosecutor to prove defendants based their rejections of plea offers on a "principled stand," the courts will "be forced to find ineffective assistance of counsel in every case where an attorney makes a prediction about law or judges and the prediction turns sour." App. at 74.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

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455 F.3d 926

United States Court of Appeals, Ninth Circuit.
Maxwell HOFFMAN, Petitioner-Appellant,
v.
Arvon J. ARAVE, Warden, Idaho Maximum Security Institution, Department of Correction, State of Idaho, Respondent-Appellee.
No. 02-99004.

Argued and Submitted Nov. 22, 2005.
Filed July 5, 2006.

Joan M. Fisher, (argued and brief) Federal Defenders of Eastern Washington and Idaho, Moscow, ID, and Ellison Matthews (brief), Boise, ID, for the petitioner-appellant.

L. LaMont Anderson, Deputy Attorney General, Boise, ID, for the respondent-appellee.

Appeal from the United States District Court for the District of Idaho; B. Lynn Winmill, District Judge, Presiding. D.C. No. CV-94-00200-S-BLW.

Before PREGERSON, W. FLETCHER, and GOULD, Circuit Judges.

PREGERSON, Circuit Judge.

The petitioner, Maxwell Hoffman, appeals the denial of his 28 U.S.C. § 2254 habeas petition based on ineffective assistance of counsel during pre-trial plea bargaining and during the guilt phase of his trial for the murder of Denise Williams. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We affirm in part and reverse in part.

I. Factual Background

The facts of the murder of Denise Williams have been recounted in numerous prior decisions in state and federal courts,[1] and are recited only briefly here. Hoffman was employed by Richard Holmes, a drug dealer. Williams, a police informant, initiated a controlled buy with Holmes, and as a consequence, Holmes was arrested for distributing controlled substances. After Holmes was released on bail, Sam Longstreet and Jeff Slawson, two of Williams's friends, went to meet with Holmes to assure him that they had nothing to do with his arrest. Holmes brokered a deal for these two friends to deliver Williams to Holmes at a camp in Idaho.

Longstreet and Slawson dropped Williams off and left her with Ron Wages, one of Holmes's associates. Thereafter, Hoffman and Holmes went to the camp and met up with Wages and Williams. Holmes kicked Williams in the head, and told Williams that she was "a dead bitch." Holmes told Hoffman and Wages, "You know what to do," and left.

Hoffman, Wages, and Williams drove around for several hours. Hoffman and Wages forced Williams to write letters exonerating Holmes of the controlled substances charges. At some point, Hoffman stopped the car and took Williams into a cave. He cut her throat while Wages waited in the car. As Hoffman was coming back to the car, Williams began to crawl up an embankment near

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[1] *See Hoffman v. Arave*, 236 F.3d 523 (9th Cir.2001); *Hoffman v. Arave*, 73 F.Supp.2d 1192 (D.Idaho 1998); *Hoffman v. Arave*, 973 F.Supp. 1152 (D.Idaho 1997); *Hoffman v. State*, 142 Idaho 27, 121 P.3d 958 (2005); *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993).

the cave. Wages ran over to Williams, and stabbed her with the knife Hoffman was carrying. Wages then began to bury her with rocks, and Hoffman joined in. The evidence showed that Williams might have eventually died either from the original cut by Hoffman or from the wound inflicted by Wages, but that the actual cause of death was a blow from a rock.

Hoffman and Wages then drove to Wages's sisters' house, where the two cleaned the car, and burned their clothes and Williams's clothes. Later, at Holmes's house, Hoffman cut up the knife with a cutting torch.

A. Idaho State Proceedings

On August 22, 1988, Hoffman was charged with first-degree murder. The court appointed William Wellman as counsel. Wellman had never tried a murder case, and had no formal training on defending capital cases. At the time he was selected to represent Hoffman, Wellman had done contract work with the Owyhee County public defender's office for several years, and criminal defense work constituted about half of his practice.

Five weeks before trial, the State offered Hoffman a plea bargain: If Hoffman would plead guilty to first-degree murder, the State would not pursue the death penalty. The State also made clear that it intended to seek the death penalty if Hoffman rejected the plea agreement. Wellman advised Hoffman that he should reject the plea agreement. Wellman believed that the Idaho death penalty scheme was unconstitutional based on *Adamson v. Ricketts,* 865 F.2d 1011, 1023-28 (9th Cir.1988) (en banc), *abrogated by Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), where this court found Arizona's death

penalty scheme unconstitutional. Wellman saw no material difference between Arizona's death penalty scheme and the death penalty scheme in Idaho. He thus recommended that Hoffman reject the plea agreement because he believed it was only a matter of time until Idaho's death penalty scheme would be declared unconstitutional as well. Hoffman took Wellman's advice and rejected the plea agreement.

In February 1989, only three weeks before trial, the court appointed co-counsel Charles Coulter. Coulter had tried two vehicular manslaughter cases, but that was the extent of his homicide experience. He had no experience with capital cases.

The guilt phase of Hoffman's trial commenced on March 7, 1989. The jury heard eight days of testimony. Defense counsel presented no evidence of Hoffman's mental capacity on the night of Williams's murder. Instead, Wellman and Coulter's central strategy was to paint Wages as the more culpable of the two.[2] After five hours of deliberation, the jury returned a conviction for first-degree murder and found a sentencing enhancement, making Hoffman "death eligible."

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[2] At trial, Wages was one of the principle witnesses against Hoffman; in exchange for Wages's testimony, the prosecution agreed not to seek the death penalty against Wages. Both Longstreet and Slawson pleaded to second-degree kidnaping charges. The prosecution recommended a sentence of at least six months in jail, and each received a sentence of only one year in jail. Holmes was originally charged with kidnaping as well, but was killed in prison before he was brought to trial. Thus, in the end, the State pursued the death penalty only against Hoffman.

The sentencing phase of the trial began on June 9, 1989. After weighing the aggravating and mitigating circumstances, the court imposed the death penalty.[3] On July 25, 1989, Hoffman filed a post-conviction petition in state court. The state court denied the petition. On January 29, 1993, the Idaho Supreme Court affirmed Hoffman's sentence. *See Hoffman,* 851 P.2d at 945.

B. Federal Habeas Proceedings

Hoffman filed an initial habeas petition in the United States District Court for the District of Idaho on December 1, 1994. On June 13, 1997, the district court dismissed several claims on the grounds of procedural default. On December 28, 1998, the district court dismissed the remainder of the claims on their merits. On January 3, 2001, we concluded that Hoffman's ineffective assistance of counsel claims were not procedurally barred. *See Hoffman,* 236 F.3d at 535-36. We also held that Hoffman's pre-sentencing interview conducted by the state probation officer was a "critical stage" of the proceeding, during which the Sixth Amendment right to counsel attached. *See id.* at 540-41. We remanded for further evidentiary hearings on Hoffman's ineffective assistance of counsel claims, and for a finding whether the deprivation of counsel during the pre-sentencing interview was harmless. *See id.*

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[3] The Idaho death penalty scheme in existence at the time of Hoffman's sentencing called for the judge, not a jury, to decide whether the death penalty was warranted. *See State v. Charboneau,* 116 Idaho 129, 774 P.2d 299, 315-17 (1989), *withdrawn and superseded by* 124 Idaho 497, 861 P.2d 67 (1993). To impose the death penalty, the court had to find that the mitigating factors, considered cumulatively, did not outweigh the gravity of each aggravating factor, considered separately. *See id.*

at 542-43. We affirmed dismissal of the remainder of Hoffman's claims. *See id.*

On remand, the district court held a five-day evidentiary hearing. The court heard substantial expert testimony about Hoffman's mental capacity, and testimony from Hoffman's trial counsel. After hearing oral argument by both parties, the district court granted Hoffman's habeas petition in part and denied it in part. The district court rejected three of Hoffman's ineffective assistance of counsel claims, specifically that counsel: (a) failed to challenge Hoffman's competency to stand trial; (b) advised Hoffman to reject a plea agreement that would have foreclosed the State from seeking the death penalty; and (c) failed to investigate or present evidence of Hoffman's diminished capacity at trial.

But the district court did accept one of Hoffman's ineffective assistance of counsel claims: that Hoffman had received ineffective assistance of counsel during sentencing. The district court found that Wellman and Coulter had not sufficiently investigated and presented mitigation evidence at sentencing that might have kept the trial judge from imposing a death sentence. The district court also found that the state trial judge's decision to deprive Hoffman of counsel during the pre-sentence interview was not harmless because it "dictated" trial counsels' sentencing strategy. The district court granted the habeas petition on these two claims and ordered the State to re-sentence Hoffman within 120 days of its order.

On April 4, 2002, after the district court issued its decision, the court issued a separate order stating that it had "fulfilled the mandate of the Ninth Circuit Court of Appeals" and therefore denied several motions Hoffman

had filed after the evidentiary hearing, including a motion to amend his habeas petition and to expand the record. Hoffman requested, and was granted, a Certificate of Appealability ("COA") on his claim that he received ineffective assistance before and during trial. The district court denied a COA with respect to its denial of Hoffman's post-hearing motions to amend the habeas petition and to expand the record.

Both parties appealed. Before us, Hoffman argued, again, that he received ineffective assistance of counsel before and during trial, and requested that we grant a COA with regard to the denial of his post-hearing motions. The State cross-appealed the district court's grant of the habeas petition for ineffective assistance of counsel at the sentencing phase. The State subsequently withdrew its cross-appeal, leaving in place the district court's order granting the habeas petition as to the sentencing phase.

Thus, the only questions remaining for this court are: (a) whether Hoffman was denied effective assistance of counsel during the plea-bargaining stage or during the guilt phase of trial; and (b) whether a COA should be granted with regard to Hoffman's post-hearing motions.

II. Ineffective Assistance of Counsel Claims

Hoffman initiated federal review of his state conviction and sentence on May 2, 1994, before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Thus, the more stringent review requirements of AEDPA do not apply. *See Caswell v. Calderon,* 363 F.3d 832, 836 n. 3 (9th Cir.2004). Under pre-AEDPA standards, an ineffective assistance of counsel claim is a mixed question of law and fact that we review *de*

novo. See Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir.2000) (en banc).

An ineffective assistance of counsel claim has two components. First, the defendant must show that counsel's conduct was not "'within the range of competence demanded of attorneys in criminal cases.'" *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson,* 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). Under this standard, we review only whether "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. There is a "strong presumption that counsel's conduct [falls] within the wide range of reasonable representation." *United States v. Ferreira-Alameda,* 815 F.2d 1251, 1253 (9th Cir.1987) (as amended) (citations omitted). Because there exist "countless ways to provide effective assistance in any given case," we will not second-guess tactical decisions made by counsel. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). Nor will we evaluate counsel's conduct through "the distorting lens of hindsight." *Hendricks v. Calderon,* 70 F.3d 1032, 1036 (9th Cir.1995) (as amended) (citations omitted). Rather, we review counsel's actions based on the facts as known to the attorney, or as reasonably could have been known to the attorney, at the time he or she acted. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052.

Second, the defendant must show that counsel's deficient performance caused prejudice. Counsel's deficient performance must be so significant "as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. 2052. The defendant need not prove definitively that the outcome would be different, but only a

"reasonable probability" of a different result. *Id.* at 693-94, 104 S.Ct. 2052. A reasonable probability is a probability "sufficient to undermine confidence in the outcome," a showing *less* than a preponderance of evidence. *Id.*

Under this rubric, we consider Hoffman's ineffective assistance of counsel claims. On appeal, Hoffman contends that his trial counsel was ineffective for three distinct reasons: (a) for failing to investigate and challenge, during the guilt phase of trial, Hoffman's capacity to form the intent to commit the crime of first-degree murder;[4] (b) for failing to investigate and to challenge his competency to stand trial; and (c) for recommending that he reject the plea bargain offer. We will consider each in turn.

A. Ineffective Assistance in Failing to Investigate and to Present a Diminished Capacity Defense

Hoffman contends that his attorneys were deficient in failing to investigate and to raise a diminished capacity defense. We agree with Hoffman that trial counsel were deficient in failing to investigate a diminished capacity defense, and therefore that Hoffman has met the first prong of the *Strickland* test. We hold, however, that no

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[4] As discussed in more detail below, Idaho does not have an affirmative defense based on either diminished capacity or intoxication. *See* Idaho Code § 18-207(a) (1989); *compare id.* § 18-207(c) (1989). Instead, a defendant's capacity to commit a crime is folded into the element of intent: the State must show, beyond a reasonable doubt, that the defendant had the capacity to form the intent to commit the crime for which he is charged. *See id.* § 18-4003; *State v. Beam*, 109 Idaho 616, 621-22, 710 P.2d 526 (1985). For ease of discussion, however, we refer to Hoffman's claim that his counsel should have challenged his intent to commit the first-degree murder as a "diminished capacity defense."

prejudice resulted from his trial counsels' deficient performance.

To meet the first prong of *Strickland,* Hoffman must show that his counsel had reason to know that Hoffman's mental capacity might be at issue in the case. *See Hendricks,* 70 F.3d at 1043 ("[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition . . . without a supporting strategic reason, constitutes deficient performance."). We do not expect counsel to be trained in psychology or mental health. In this case, however, Wellman and Coulter's interactions with Hoffman provided them significant clues that would put a reasonable lawyer on notice that Hoffman's capacity to form the intent to commit first-degree murder was at issue.

Both Wellman and Coulter recognized that Hoffman had some level of cognitive difficulty. Both testified that their communications with Hoffman were stinted, and that Hoffman had difficulty answering questions. Wellman testified that he recognized that Hoffman had a "pretty low" IQ and that he had difficulty understanding their discussions. He stated: "[G]enerally speaking, as I sit here today and try to put myself back into that time period of the five months or so prior to trial, it was fairly – it should have been evident to me that there were some serious psychiatric problems with Max [Hoffman]." Coulter similarly explained: "[O]ver a period of a week or two or however many weeks it was . . . I came to realize, just based on my own lay experience, that [Hoffman] had a problem." In fact, Hoffman's counsel testified that part of the reason they decided not to have Hoffman testify at the guilt phase of trial was because of his mental limitations.

Surely, then, Hoffman's attorneys were on notice that Hoffman's mental capacity might be at issue.

In addition, Hoffman's explanation as to why he slit Williams's throat was facially illogical and should have indicated to counsel that Hoffman was not entirely well. Hoffman told Wellman and Coulter that when he took Williams into the cave and slit her throat, he was trying to save her life. He claimed that he believed that if he slit her throat superficially, she would stay in the cave, he could get Wages to leave, and that she could take herself to safety. The logic is, of course, faulty, given that Williams would be left bleeding in the middle of nowhere with no means of communication. This illogical explanation should have put Hoffman's trial attorney on notice that Hoffman's mental capacity might be at issue.

Third, counsel knew that Hoffman had a history of drug abuse. Wellman testified that he remembered "clear indication of fairly steady, regular use of crank," or methamphetamine, by Hoffman. In addition, counsel knew that Hoffman had ingested significant amounts of drugs on the night of Williams's murder. The amount of drugs alone probably should have led counsel to investigate whether Hoffman might have been intoxicated and whether this intoxication might have affected Hoffman's ability to form the intent to commit first-degree murder.

Based on these facts, we believe that counsels' performance fell below an objective standard of reasonableness because reasonable counsel in this situation would have recognized that Hoffman's capacity on the night of Williams's murder might have been affected by mental health problems, by drug use, or by some combination of the two. Once counsel was on notice that Hoffman's

capacity on the night of Williams's murder was at issue, counsel had an absolute duty "to make reasonable investigations or to make a reasonable decision that [made] investigations unnecessary." *Strickland,* 466 U.S. at 668, 691, 104 S.Ct. 2052; *see also Douglas v. Woodford,* 316 F.3d 1079, 1085 (9th Cir.2003) ("Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired."). In this case, both Wellman and Coulter admitted that they did not conduct a factual investigation into Hoffman's mental capacity, nor did they research the viability of a diminished capacity defense. Wellman himself admitted that he "probably didn't give the [diminished capacity] defense due consideration." This failure fell below the objective standard of reasonableness.

We cannot agree with the district court that such failure was tactical or that counsel made a "reasonable decision that [made] investigations unnecessary." *See Strickland,* 466 U.S. at 668, 691, 104 S.Ct. 2052. The record does not reflect a calculated decision by counsel not to investigate a diminished capacity defense. Wellman testified that he was "not sure [they] really had a good cogent theory of defense." To the extent that counsel had a theory, the theory was that Wages was the principal perpetrator of the offense because Wages had engaged in sexual intercourse with Denise Williams on the night of the murder and was trying to cover it up. That is, the theory was that because Hoffman was less culpable than Wages, then Hoffman, like Wages, should be spared the death penalty. Wellman, however, was unable to sufficiently develop this theory. And even if counsel had been able to develop this theory, the theory is not a defense to first-degree murder where an aider and abetter is just as

criminally liable as the one who deals the fatal blow. *See* Idaho Code § 18-204 (1989); *State v. Gonzalez,* 134 Idaho 907, 12 P.3d 382, 384 (2000). A diminished capacity defense in Idaho could have negated the intent element required for first-degree murder, and, if successful, could have spared Hoffman's life. Thus, counsels' decision – if it can be called that – to forego a diminished capacity defense to pursue a strategy that would not result in a lesser charge falls outside the range of tactical decisions.

Moreover, pursuing a diminished capacity defense is not inconsistent with trial counsels' theory of the case. Rather, a showing that Hoffman was suffering from psychosis or intoxication would have furthered counsels' argument that Wages was the more culpable of the two, and could only have supported counsels' sentencing strategy. We can see no tactical disadvantage to investigating a diminished capacity defense, a defense with a plausible factual basis that might have allowed Hoffman to escape first-degree murder and would have, in any event, furthered counsels' strategy.

The State tries to paint counsels' behavior as a strategic decision of where to focus money and resources. This is contradicted by counsels' own admissions that they did not have a clear theory of defense, and that they were "just kind of spinning" in the weeks and months before trial. Moreover, if Wellman and Coulter failed to develop a diminished capacity defense because they lacked funds, this evidences a more serious deficiency: a failure to understand controlling law. Wellman testified that they did not ask for an investigator or for a mental health expert because they did not think the judge would have granted such a request. But in *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme

Court held that where an indigent defendant can demonstrate that his mental capacity is likely to be a "significant issue" at trial or capital sentencing, he has an absolute right to be provided with psychiatric and psychological expert assistance. We agree with the district court, then, that "standards of professional competent assistance required [counsel] to request funds which would allow for adequate investigation or to preserve the issue for appeal." Thus, the failure to investigate and present a diminished capacity defense at trial cannot be forgiven based on the lack of resources available to Wellman and Coulter.

For these reasons, we conclude that Hoffman has met the first prong of *Strickland;* he has shown that it was objectively unreasonable for counsel not to investigate a diminished capacity defense.

But this is not enough for Hoffman to succeed on his ineffective assistance of counsel claim. He must also show a "reasonable probability" that the outcome of the trial would have been different had counsel investigated his mental capacity. *Strickland,* 466 U.S. at 693-94, 104 S.Ct. 2052. Where counsels' deficiency involves the failure to investigate a possible defense, we evaluate whether there is a "reasonable probability" that a competent investigation would have turned up evidence bearing on that defense that would have affected the outcome of trial. *See Stankewitz v. Woodford,* 365 F.3d 706, 717-19 (9th Cir.2004) (focusing the prejudice inquiry on the information that a reasonable investigation would have unearthed).

It is apparent that Hoffman suffered and continues to suffer some degree of mental disability. Eight years before Williams was murdered, Hoffman was committed for six

days in the Metropolitan State Hospital in Norwalk, California, where he was diagnosed as suffering from "psychosis manifested by delusional and violent behavior." At the habeas hearing, before the district court, Hoffman offered the expert testimony of three doctors who each testified that Hoffman likely had some degree of psychotic thought disorder in 1989. The doctors also agreed that this illness might affect Hoffman's ability to reason. As Dr. Merikangas, a psychiatrist and neurologist, explained, psychosis is a "formal thought disorder where the person's thinking is not consistent with reality and with logical thought as experienced by normal people. It is generally characterized by problems with logic, problems with abstracting ability, sometimes with hallucinations." More important for our purposes, Dr. Merikangas testified that congenital brain damage visible on MRIs taken in 1996 and in 2001 could have been detected had an MRI been taken of Hoffman's brain in 1989.

This expert testimony of these three doctors is supported by the testimony of Dr. Sanford, the psychologist who examined Hoffman before his sentencing hearing in 1989. Dr. Sanford wrote, in his 1989 report, that his initial meeting with Hoffman left him with the impression that "some brain damage or neurological problem [might be] responsible for the types of difficulties he was showing on the initial assessment," especially his difficulty in communicating. After further testing, Dr. Sanford concluded that Hoffman's symptoms were consistent with "brain damage to the left hemisphere." This report is as close to a contemporaneous mental health evaluation as exists, and indicates that a reasonably competent investigation in 1988 could have adduced evidence to support a diminished capacity defense during the guilt phase.

The State presented the testimony of Dr. Smith, a neurosurgeon, who opined that the MRI scans fell within the normal range. At the same time Dr. Smith admitted that he rarely read MRIs and that it was not his specialty. While the evidence is somewhat ambiguous, we believe Hoffman probably could have presented some evidence that would have supported a finding that he suffered from some degree of psychosis at the time of Williams's murder.

In addition to evidence of psychosis, there is significant evidence that Hoffman's IQ fell within the range of mental retardation. The clinically-accepted range of mental retardation is an IQ score of 70, with a five point margin of error. *See Atkins v. Virginia,* 536 U.S. 304, 309 n. 5, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Hoffman's IQ has fluctuated between 72 when tested in 1989 and 74 when tested in 2001. The district court properly concluded, then, that Hoffman was "borderline retarded." This evidence could have been presented in 1989.

In addition, Hoffman had a significant history of drug abuse. Counsel knew that Hoffman used methamphetamine and cocaine at least four times on the day of Williams's murder. Expert testimony was presented in the district court about the effect of drug use on a person with psychosis: that drug use frequently induces a person with psychosis to have more "florid psychosis and delusions." This evidence also could have been presented at the guilt phase of trial in 1989.

But even if we were to assume that all of the above testimony could have been presented at trial, there is not a "reasonable probability" that such evidence would have altered the outcome of the guilt phase of Hoffman's trial. Idaho's law is more demanding than most states' laws on

the question of mental capacity. In Idaho, at the time of Hoffman's trial (as now) there was no "diminished capacity," "intoxication," or "insanity" defense. *See* Idaho Code § 207(a) (1989). Rather mental capacity was folded into the element of intent: the prosecution was required to prove, beyond a reasonable doubt, that the defendant had the mental capacity to form the intent to commit the crime charged. *See State v. Card,* 121 Idaho 425, 825 P.2d 1081, 1085-86 (1991). Section 18-115 of the Idaho Code, as it existed at the time of Williams's murder, states that intent is "manifested by the circumstances connected with the offense, *and the sound mind and discretion of the accused.*" Idaho Code § 18-115 (1989) (emphasis added). Thus, diminished capacity and intoxication are not "general excuse[s]" for crime, but the jury can consider such factors as they relate to whether the defendant was able to form the intent to commit the crime for which he was charged. *See State v. Hall,* 111 Idaho 827, 727 P.2d 1255, 1262-63 (1986).

Hoffman was charged with first-degree murder and with aiding and abetting first-degree murder, and the jury was instructed on both theories. Accordingly, to find prejudice, we would have to conclude that there is a reasonable probability that evidence of Hoffman's mental capacity would negate not only the intent to murder Williams, but would also negate the intent to "knowingly assist [or] facilitate" Williams's murder. *See State v. Paradis,* 106 Idaho 117, 676 P.2d 31, 40 (1983). We cannot do so.

First, we note that Hoffman had the mental capacity to complete several intentional acts on the night of the murder. Hoffman drove around for several hours, and he changed a flat tire on a car. While there was testimony

presented to the district court that a person in a drug-induced psychosis can perform certain simple motor functions, this is nonetheless good evidence that Hoffman had some level of mental functioning on the night of Williams's murder. In addition, on that same night, Hoffman destroyed evidence of the murder: he burned his, Williams's, and Wages's clothing, he helped to clean the car, and he cut up the weapon. Such behavior indicates some level of cognitive planning – a recognition of criminal behavior – and cuts against a diminished capacity defense.

Second, Hoffman bragged about the murder to his cohorts. Hoffman told Ricky Williams, a cellmate, that he had "slashed" Williams's throat, and that he had killed Williams. Hoffman also told Kenneth Hunnicutt, a friend and cellmate, that he cut Williams's throat, and that because she "wouldn't die" Wages threw a rock at her. Victor Gezzi, another friend, testified that Hoffman told him that Williams "was took care of" and that he had cut Williams's throat. Hoffman's act of telling others that he was the perpetrator of the crime is inconsistent with his testimony that he was trying to help Williams by slitting her throat. Thus, Hoffman's admissions would likely have discredited a diminished capacity defense in the jury's mind.

Third, if Hoffman had contested his capacity to form the intent to participate in Williams's murder, evidence of a subsequent crime that Hoffman committed could have been admissible. Four months after Denise Williams was murdered, Hoffman, Holmes, and Wages together kidnaped a man named Ricky Simonis. On that occasion, Hoffman drove the car, and later held Simonis while Wages beat him. Hoffman then held a gun to Simonis's head while Simonis signed the title of his car over to

Holmes. *See State v. Hoffman,* 116 Idaho 480, 776 P.2d 1199 (1989). Evidence of this kidnaping was excluded at the trial, but might have been admitted under Idaho law if Hoffman had challenged the element of intent in the instant case. *See State v. Dayley,* 96 Idaho 527, 531 P.2d 1172, 1173-74 (1975) (holding that where a defendant challenges his mental capacity to form criminal intent, other criminal actions may be admissible to prove the defendant's intent or "rationality" at the time of the crime); *see also* Idaho R. Evid. § 404(b); *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680, 688-89 (1991), *rev'd on other grounds by State v. Card,* 121 Idaho 425, 825 P.2d 1081 (1991) (affirming admission of both prior and subsequent bad acts under Idaho R. Evid. 404(b)). Williams's murder was not Hoffman's first foray into the criminal justice system – a fact that would have come to light had Hoffman raised a diminished capacity defense.

Finally, we consider Wellman's evaluation, that his "experience with the makeup of the juries in Owyhee County led [him] to believe that it was not the type of jury makeup that would be attracted to a more mental-capacity-oriented case." Wellman stated that he doubted that he "could persuade a bunch of farmers and ranchers that [there was] voluntary intoxication to the point that you [could not] form the intent to commit the crime." While Wellman's statement might be discounted somewhat, given his lack of experience in capital cases, Wellman had been a member of the Idaho criminal bar for ten years before he represented Hoffman, and his evaluation about the

likelihood that the jurors would accept this defense is entitled to some weight.[5]

While it is impossible to divine exactly what might sway a jury in any given situation, we do not believe that a jury would have found that Hoffman was not capable of forming the intent to murder Williams, or at least to knowingly participate in her murder. The fact that he had the cognitive ability to recognize that he should cover up evidence of Williams's murder, that he was able to perform functions such as driving and changing a tire, and that he was involved in Simonis's kidnaping during the same period indicate that Hoffman probably had sufficient capacity to know what he was doing and what the end result of his conduct would be. We do not believe there is a "reasonable probability" that a jury would have found otherwise. Accordingly, we conclude that Hoffman was not prejudiced by his counsels' deficient performance in failing to investigate and present a diminished capacity defense.

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[5] In evaluating Hoffman's claims based on diminished capacity and competency, we do not rely on Hoffman's testimony at the sentencing phase of his trial. It is not clear whether Hoffman would have testified had he not been deprived of counsel at his pre-sentencing interview, which was found by the district court to constitute a violation of his Sixth Amendment right to counsel. Testimony by Hoffman's counsel indicates that they called Hoffman to testify, in part, with the goal of undoing the damage that had been done in the pre-sentencing interview. The district court also found that the deprivation of counsel during the pre-sentencing interview dictated counsels' strategy at sentencing. Accordingly, we do not base our holding here on any statements Hoffman made at sentencing.

B. Ineffective Assistance in Failing to Contest Hoffman's Competency

Hoffman claims that his attorneys were ineffective because they did not contest his competency to stand trial. We conclude that Hoffman was not prejudiced by his attorneys' failure to move for a competency hearing, and thus decline to consider whether trial counsel's conduct fell below an objective standard of reasonableness under the first prong of *Strickland.*

A person is competent to stand trial if he understands the proceedings and is able to assist counsel in his defense. *See Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Competency requires "the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping to prepare an effective defense." *Odle v. Woodford,* 238 F.3d 1084, 1089 (9th Cir.2001) (citing *Dusky,* 362 U.S. at 402, 80 S.Ct. 788).

Our above finding, that counsel had reason to doubt Hoffman's mental capacity, does not inexorably lead to the conclusion that Hoffman was incompetent to stand trial. The standard for competency to stand trial is lower than the standard for capacity to commit a crime. *United States v. Flynt,* 756 F.2d 1352, 1365 n. 11 (9th Cir.1985). Those with mental disorders "frequently know the difference between right and wrong and are competent to stand trial," even if they are regarded as less culpable because of their mental capacity. *Atkins,* 536 U.S. at 318, 122 S.Ct. 2242. As such, we have held that those with mental deficiencies are not necessarily incompetent to stand trial. *See Boyde v. Brown,* 404 F.3d 1159, 1166-67 (9th Cir.2005). In this case, we find that there is no reasonable probability

that the court would have found Hoffman incompetent to stand trial.

Wellman admitted that he "had concerns about [Hoffman's] ability to follow, to take in info[rmation] and respond to it." Wellman noted Hoffman's passive nature, that he would often nod along even when things were going over his head. Counsel also noticed that Hoffman had difficulty orally expressing himself and presented an "odd" theory of why he slit Denise Williams's throat. At the same time, both trial counsel testified that Hoffman had some ability to describe what happened to Williams and to discuss his role and the role of others in her murder. As Wellman put it, Hoffman understood the facts of the case against him, even if he did not always understand the law. Based on that description of Hoffman's capabilities, it is unlikely that counsel could have convinced the court that Hoffman was incompetent to stand trial.

In addition, observations of Hoffman by those around him at the time of his trial also suggest that Hoffman would not have been found incompetent to stand trial. For example, Dr. Sanford, the expert who interviewed Hoffman in 1989 prior to sentencing, testified that he did not note any "frank" indications of incompetence. Indeed, Hoffman himself testified, at his post-conviction hearing in December 1989, that "to the best of his knowledge" he had followed what was going on during trial and that he understood his attorneys' strategy. Given counsels' assessment of Hoffman's ability, Dr. Sanford's evaluation of Hoffman near the time of trial, and Hoffman's own evaluation of his competency during the trial, we do not believe that Hoffman would have been declared incompetent, had his attorneys moved for a competency hearing.

The record indicates that Hoffman had difficulty understanding the aider and abettor theory of liability. But competency to stand trial requires an understanding of the *factual* basis of the proceedings, and does not require mastery of technical legal knowledge. *See Godinez v. Moran,* 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *see also Allard v. Helgemoe,* 572 F.2d 1, 4 (1st Cir.1978) (concluding that a defendant's inability to understand the intent element of a crime did not render him incompetent). Hoffman's difficulty in accepting the culpability of indirect participants to a crime would not have made him incompetent to stand trial.

In short, we conclude that Hoffman has not proved an ineffective assistance claim based on his counsels' failure to challenge his competency because there is not a reasonable probability that Hoffman would have been found incompetent. Because Hoffman was not prejudiced by his counsels' conduct, we affirm the district court's finding that Hoffman was not denied the effective assistance of counsel when his attorneys failed to move for a competency hearing.

C. Ineffective Assistance in Counseling Hoffman Regarding the Plea Offer

Finally, Hoffman claims that he received ineffective assistance of counsel during the plea bargaining process. On this claim, we conclude that Hoffman did receive ineffective assistance of counsel when Wellman advised

him to reject the plea agreement offered by the prosecution.[6]

1. *Deficient Performance of Counsel*

On February 6, 1989, the Owyhee County prosecutor proposed that Hoffman plead guilty to first-degree murder in exchange for an agreement by the State not to pursue the death penalty against Hoffman during sentencing. The offer was set to expire on February 16, 1989. Wellman advised Hoffman to reject the plea agreement.

Wellman based his advice on our en banc decision in *Adamson v. Ricketts,* 865 F.2d at 1029-39, filed on December 22, 1988, about six weeks before the plea offer was tendered. In *Adamson,* we held that Arizona's death penalty scheme was unconstitutional because it permitted sentencing facts to be found by the judge, and not the jury. *See id.* at 1023. Wellman noted the similarities between the Arizona statute found unconstitutional in *Adamson* and the Idaho death penalty statute. *See* Idaho Code § 19-2515 (1989). Based on *Adamson,* he advised Hoffman that he was unlikely to receive the death penalty because it was only a matter of time before Idaho's death penalty scheme would also be, in his view, found unconstitutional.

On January 9, 1989, before the prosecutor tendered the plea offer to Hoffman on February 6, 1989, the State of Arizona had already signaled its unhappiness with our ruling in *Adamson* by petitioning for rehearing. On February 1, 1989, this court stayed the mandate in *Adamson*

[6] At the time the State offered Hoffman this plea agreement, Coulter had not yet been appointed as co-counsel. Thus, only Wellman was involved in advising Hoffman to reject the plea agreement.

pending the Supreme Court's disposition of the State's anticipated petition for certiorari to the Supreme Court. When Hoffman let the prosecutor's offer lapse on February 16, 1989, the State had not yet filed a petition for certiorari in *Adamson,* but it was a virtual guarantee that the State would do so.

On February 2, 1989, four days before the prosecutor tendered the plea offer, the Supreme Court of Arizona filed its decision in *State v. Walton,* 159 Ariz. 571, 769 P.2d 1017 (1989), *overruled in part by Ring v. Arizona,* 536 U.S. 584, 603, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), in which it reaffirmed its earlier view that jury sentencing was not constitutionally required in death penalty cases, directly contrary to our decision in *Adamson. See Walton,* 769 P.2d at 1030. Thus, on February 16, 1989, when Hoffman let the prosecutor's offer lapse, there was a clear and direct conflict between the Arizona Supreme Court's decision in *Walton* and our decision in *Adamson.* The State of Arizona had already clearly signaled its intention to appeal our decision in *Adamson,* and it was not hard to guess that the defendant in *Walton* would do the same.

Indeed, certiorari was sought in both cases. In October 1989, the Supreme Court granted certiorari in *Walton,* holding in abeyance the petition in *Adamson. See Walton v. Arizona,* 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989). On June 27, 1990, the Supreme Court affirmed the Arizona Supreme Court's decision in *Walton,* thereby directly upholding the constitutionality of Arizona's judge-sentencing scheme in capital cases, and implicitly upholding the comparable Idaho scheme. *See Walton v. Arizona,* 497 U.S. 639, 647-49, 110 S.Ct. 3047, 111 L.Ed.2d 511

(1990).[7] Then, on June 28, 1990, the Supreme Court denied the petition for writ of certiorari in *Adamson*. *See Lewis v. Adamson*, 497 U.S. 1031, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990).

We do not fault Wellman for failing to predict the outcome of these divergent opinions. We do not expect counsel to be prescient about the direction the law will take. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.1994) (holding that a lawyer is not ineffective for failing to anticipate a decision in a later case); *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir.1972) ("Clairvoyance is not a required attribute of effective representation.").

Nor was it unreasonable for Wellman to draw a connection from the Arizona death penalty scheme to the Idaho scheme. The same fault that the Ninth Circuit identified in Arizona death penalty law was present in Idaho's law: both permitted the sentencing judge to sentence a defendant to death based on the judge's own factual findings. In short, then, Idaho's statute and Arizona's statute were materially indistinguishable. *See Charboneau*, 774 P.2d at 316-17 (declining to adopt *Adamson* even though the court found no material difference between Idaho's scheme and Arizona's scheme). Indeed, several of Wellman's colleagues in the Idaho state bar argued in Idaho state courts that Idaho's statute was

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[7] Of course, the Supreme Court has since reversed itself, holding in *Ring v. Arizona*, 536 U.S. 584, 603, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the judge-sentencing scheme is, after all, unconstitutional in death penalty cases. But the Court has also held that *Ring* is not to be applied retroactively, *see Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), providing no help to those, like Hoffman, who were sentenced to death under the old judge-sentencing scheme.

unconstitutional under *Adamson*. *See, e.g., id.; State v. Lankford,* 116 Idaho 860, 781 P.2d 197, 206-07 (1989). Thus, Wellman was not unreasonable in drawing a connection between our decision in *Adamson* and Hoffman's case.

We nonetheless find that Wellman's representation of Hoffman during the plea bargaining stage was deficient for two reasons: first, Wellman based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little.

The first problem is that Wellman based his advice solely on a reading of *Adamson* and not on an understanding of the general landscape in which that case arose. Wellman testified that he had read Idaho Supreme Court capital cases, and therefore he must have known that the Idaho state courts had considered and consistently rejected claims similar to *Adamson*. *See State v. Fetterly,* 109 Idaho 766, 710 P.2d 1202, 1208 (1985); *State v. Creech,* 105 Idaho 362, 670 P.2d 463, 473-74 (1983), *rev'd in part, Arave v. Creech,* 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993); *State v. Sivak,* 105 Idaho 900, 674 P.2d 396, 398-99 (1983). With minimal research, he would have discovered that a pair of cases was well on its way to the Idaho Supreme Court that would challenge the continuing viability of these Idaho Supreme Court cases in light of our holding in *Adamson*. *See State v. Fain,* 116 Idaho 82, 774 P.2d 252 (1989); *Charboneau,* 774 P.2d at 315-17 (reaffirming *Creech,* decided April 4, 1989, less than two months after Hoffman rejected the plea agreement).

Had Wellman researched Arizona law, he would have discovered that on February 2, 1989, after *Adamson,* but before Hoffman rejected the plea offer, the Arizona Supreme Court reaffirmed the constitutionality of Arizona's

death penalty scheme. *See Walton,* 769 P.2d at 1030-31. A judge who concurred in *Walton* recognized that the decision might set up a conflict between Arizona law and Supreme Court precedent and cited the Ninth Circuit's decision in *Adamson. See id.* at 1039 (Feldman, V.C.J., concurring). With the state of the law in turmoil both in Arizona and in Idaho, and with conflicts between this court and the state supreme courts of both states, a reasonable attorney would have recognized the substantial risk of advising a client to reject a plea agreement. Because Wellman possessed a deficient understanding of the law, he led Hoffman to believe that his sentence would be the same whether he accepted the plea bargain or was convicted at trial. Such advice was constitutionally deficient. *See Cullen v. United States,* 194 F.3d 401, 403-04 (2d Cir.1999); *Meyers v. Gillis,* 142 F.3d 664, 666-68 (3d Cir.1998).

If there was a high probability that Hoffman was not going to receive the death penalty, Wellman might have been reasonable in considering our decision in *Adamson* as an additional reason to reject the plea agreement. But Hoffman's chance of receiving the death penalty was not minimal, a fact that counsel vastly underestimated and that made counsel's failure to investigate *Adamson* more disastrous. Under the plea agreement, Hoffman would have given up his right to challenge the first-degree murder charge based on aider and abetter liability. But Wellman admitted that his central strategy at trial – that Hoffman was less culpable than other participants in the murder, especially Wages – could also support a first-degree murder charge. Thus, Wellman advised his client to go to trial and risk the death penalty even though there was a good possibility that the guilt phase of trial would

result in a first-degree murder charge, the same outcome as the plea agreement. This was a huge risk in light of the potential downside, that is, that the court could impose the death penalty. In contrast, under the plea agreement, Wellman could have argued his client's lesser culpability at sentencing while ensuring that Hoffman would not receive a death sentence.[8] Considering the magnitude of the gamble that Wellman was advocating, Wellman's failure to fully research the landscape surrounding *Adamson* constituted deficient performance.

We certainly do not mean to imply that counsel is ineffective in relying on our precedent or in arguing for a reasonable extension of this court's decisions. In this case, however, counsel advised Hoffman to give up the certainty of avoiding the death penalty so that he could go to trial, a risky proposition with a substantial downside. More importantly, he offered this flawed advice without conducting reasonable research into the legal landscape. We therefore conclude that Wellman's legal representation of Hoffman during the plea bargaining stage was not objectively reasonable.

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[8] In Idaho in 1989, a defendant convicted of first-degree murder could be sentenced to death or to a life sentence. *See* Idaho Code § 18-4004 (1989). Where the judge imposed a life sentence, the judge also had to determine a period of confinement, at least ten years, in which the defendant would not be eligible for parole. *See id.* Thus, under the plea agreement, Hoffman's counsel would have had full latitude to argue to the judge that Hoffman's culpability in Williams's murder warranted life with the possibility of parole.

2. *Prejudice*

As stated above, deficient performance by counsel is not a sufficient basis to reverse. Hoffman must also show that he was prejudiced by his counsel's deficient performance. Hoffman must show that there is a reasonable probability that he would have accepted the plea agreement had he received accurate advice from his attorney. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052; *Nunes v. Mueller,* 350 F.3d 1045, 1054 (9th Cir.2003); *Cullen,* 194 F.3d at 403; *Wanatee v. Ault,* 259 F.3d 700, 704 (8th Cir.2001). We hold that there is a "reasonable probability" that the outcome of the proceedings would have been different had counsel acted competently.

Wellman testified that Hoffman had a "compliant personality," and would frequently defer to Wellman's decision-making. Wellman testified that, throughout the process, Hoffman would say "Well, Bill, you are the lawyer, you know, you know more about it than I do." Coulter also testified that Hoffman would frequently defer to their decisions about how the defense ought to be managed. This strongly suggests that, had Wellman fully presented Hoffman's options and told Hoffman that he was giving up very little in exchange for the security of the death penalty being off the table, Hoffman probably would have gone along with Wellman's suggestion and would have accepted the plea agreement.

The State argues that, regardless of Wellman's advice, Hoffman would not have taken the plea agreement because Hoffman wanted the State to prove the charges against him. The State points to Wellman's testimony:

> I would describe [Hoffman as being] of the old school. He was not . . . going to snitch on anybody,

> he was not going to turn on anybody. And if the State charged him, then they needed to prove it.

The State's argument pulls Wellman's testimony out of context. In the next sentence, Wellman admitted that he did not know whether Hoffman had insisted on going to trial in any previous criminal proceeding. He then explained that Hoffman was surprised that he was indicted, because he "perceived himself as being out of the circle" of those responsible for Williams's murder, i.e., Holmes and Wages. As such, Wellman explained, "he needed to see the evidence that the State had in order to satisfy his mind or convince him[self]" that the State had a case against him.

When read in this light, Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement. Rather, Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him. Had Hoffman been presented with an accurate evaluation (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea. Therefore, we find that Hoffman suffered prejudice because of his counsel's inadequate performance.

3. *Remedy*

Because we find that Hoffman was deprived of the effective assistance of counsel, we must determine the

proper remedy. A habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred." *United States v. Blaylock,* 20 F.3d 1458, 1468 (9th Cir.1994) (as amended). Where a defendant is deprived of the opportunity to make a reasoned decision about a proffered plea agreement, the proper remedy is reinstatement of the offer of the plea agreement. *See id.* at 1468-69; *see also Nunes,* 350 F.3d at 1056-57.

Accordingly, we order the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the "same material terms" offered in the original plea agreement. *Nunes,* 350 F.3d at 1057.

III. Uncertified Issues

Hoffman has requested that we expand the COA to consider two additional issues: (a) whether the district court abused its discretion in denying Hoffman's motion to amend his petition; and (b) whether the district court abused its discretion when it denied Hoffman's motion to expand the record.[9]

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[9] In his opening brief, Hoffman raised a third uncertified issue, challenging whether *Ring v. Arizona,* 536 U.S. 584, 598, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), should apply retroactively to his death sentence. Hoffman conceded that the issue was relevant only if we reversed the district court's order granting the habeas petition on the grounds of ineffective assistance of counsel at the sentencing phase. Because the State withdrew its cross-appeal on grant of the habeas petition on the sentencing phase, we do not consider the Petitioner's *Ring*-related request for a COA.

A COA should be granted where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 & n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).

A. Motion to Amend the Habeas Petition

On February 7, 2002, after the district court held an evidentiary hearing on Hoffman's habeas petition but before oral argument, Hoffman moved to amend his habeas petition. Hoffman wished to amend the language of his ineffective assistance claim to include the following language:

> As a result of his mental states, including retardation and congenital and drug-induced psychosis, Petitioner's admissions regarding his presence and participation in the offense are suspect and should have included further investigation into the truth of Petitioner's statements, all of which would have called into question the reliability of admissions made by Petitioner, raising a reasonable doubt as to Petitioner's guilt and giving the jury evidence to support a finding of actual innocence.

Thus, Hoffman sought to add a claim of ineffective assistance based on his counsels' failure to raise a factual innocence claim.

Hoffman also sought permission to add three additional claims, each contending that the death penalty, as applied to him, violated the Eighth Amendment prohibition on cruel and unusual punishment because he is mentally retarded. The latter amendment was requested shortly after the Supreme Court granted certiorari in *Atkins v. Virginia,* 534 S.E.2d 312 (Va.2000), on the same issue. *See Atkins v. Virginia,* 533 U.S. 976, 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001).[10] Instead of permitting Hoffman to amend his habeas petition to include these *Atkins*-related claims, the district court ruled in Hoffman's favor on a different ground and then denied the motion to amend the petition.

A district court "shall grant leave to amend freely 'when justice so requires.'" *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir.2000) (en banc) (citing Fed.R.Civ.P. 15(a)). A district court may deny leave to amend based on "the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Griggs v. Pace Am. Group, Inc.,* 170 F.3d 877, 880 (9th Cir.1999).

Given our holding above, Hoffman will almost certainly not be subject to the death penalty, assuming he accepts the plea agreement. Thus, Hoffman's request to amend his petition to add *Atkins*-type claims is moot. We are left with Hoffman's request to add an actual innocence claim to his habeas petition. We will grant the COA, in that reasonable minds could differ over whether the

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[10] In *Atkins v. Virginia,* 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), filed after the district court's decision in this case, the Supreme Court held that execution of the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment.

district court should have permitted Hoffman to amend his habeas petition to include an actual innocence claim.

We find, however, that the district court did not abuse its discretion in refusing to allow Hoffman to amend his claim. The legal basis for Hoffman's actual innocence claim is "tenuous." *See Caswell v. Calderon,* 363 F.3d 832, 837-38 (9th Cir.2004) (finding that the district court did not abuse its discretion when it denied petitioner's request to amend his habeas petition to include a "tenuous" claim). Given the amount of evidence showing that Hoffman knowingly and intentionally participated in Williams's murder, we do not believe that counsel was objectively unreasonable in failing to investigate an actual innocence theory premised on the reliability of Hoffman's admission. The likelihood of success on such a claim was minimal given the amount of evidence – outside of Hoffman's admissions – showing that Hoffman was present at the scene and participated in Williams's murder. For the same reason, Hoffman suffered no prejudice from his counsel's failure to raise an actual innocence claim, because there is not a reasonable probability that the jury would have accepted such a claim. Accordingly, the district court's refusal to allow Hoffman to add such a tenuous ineffective assistance of counsel claim at such a late hour was not an abuse of discretion.

B. Motion to Expand the Record

Hoffman also challenges the district court's denial of his motion to expand the record. Given the district court's time constraints, the court asked both parties to consider presenting testimony in the form of deposition transcripts instead of examination in open court. After the evidentiary hearing but before oral argument, Hoffman filed a motion

to expand the record to include: (a) deposition testimony of Levi Martinez and Don Sherman, both of whom testified that Holmes told them that Hoffman was being set up to take the fall for Williams's murder; (b) the declarations of Renee Lundquist and Richard Simonis, who each testified that Hoffman had been held responsible for other criminal acts by Holmes and Wages; and (c) the pre-sentence interview of Richard Holmes, in which he admitted that he often got others to do his "dirty work" for him. This evidence, Hoffman alleged, would support his claim of actual innocence. The state stipulated to admission of the depositions of Martinez and Sherman, but challenged admission of the remaining documents. After rendering its decision on the habeas petition, the district court summarily denied Hoffman's motion to expand the record.

It is not clear why the district court did not allow Hoffman to introduce these documents, especially those the State had stipulated were admissible. Apparently, the district court did not see these documents as useful to its decision, and "having fulfilled the mandate of the Ninth Circuit," it declined to include them in the record.

We grant the COA on this issue, in that reasonable jurists could differ as to whether the district court, having requested the parties to submit deposition testimony in lieu of live testimony and having promised to review the deposition testimony, should then exclude the documents. Even if the court did not find the documents to be dispositive to its decision, the better practice would have been to admit the documents, if nothing else, so that Hoffman would have the benefit of these documents on appeal.

But any error was harmless here. Even if we were to consider all of the requested documents, *see Burnett v.*

Lampert, 432 F.3d 996, 1001 n. 7 (9th Cir.2005), it would not change our decision in this case. Testimony that Hoffman was being set up to take the fall for Williams's murder is highly relevant for sentencing purposes. But, as noted above, none of the testimony at issue demonstrates that Hoffman did not knowingly and intentionally participate in Williams's murder. Nor do these documents affect our finding that no prejudice inhered from counsel's failure to pursue a diminished capacity defense; a finding of diminished capacity requires more than the influence of another to commit a crime. We thus find that any district court error in not expanding the record was harmless.

IV. Conclusion

For the foregoing reasons, we GRANT the habeas petition with respect to ineffective assistance of counsel during the plea bargaining phase, and we remand for proceedings consistent with this opinion. As stated above, we order the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the "same material terms" offered in the original plea agreement. On all other points, we affirm the district court.

AFFIRMED IN PART, REVERSED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MAXWELL HOFFMAN, Petitioner, v. A. J. ARAVE, Warden, et al., Respondents.	CIVIL NO. 94-0200-S-BLW **CAPITAL CASE** **MEMORANDUM DECISION AND ORDER ON REMAND**

OVERVIEW.

(Filed Mar. 30, 2002)

On December 28, 1998, the Court denied relief on Petitioner Maxwell Hoffman's Amended Petition for Writ of Habeas Corpus.[1] Hoffman appealed to the Ninth Circuit Court of Appeals. On March 12, 2001, the court of appeals issued a mandate affirming in part, and reversing in part, the decision of this Court. *See Hoffman v. Arave,* 236 F.3d 523 (9th Cir. 2001). The court of appeals reversed this Court's conclusion that Hoffman's claim of ineffective assistance of counsel, claim M, had been procedurally defaulted, and remanded the case for an evidentiary hearing on that issue.[2] The court of appeals also reversed

[1] Hoffman's Amended Petition contained fourteen claims. On June 13, 1987, the Court dismissed several claims pursuant to the procedural default doctrine and for failure to state a federal constitutional claim. *See Hoffman v. Arave,* 973 F.Supp 1152 (D. Idaho 1997). On December 28, 1998, the Court dismissed the remaining claims after review on the merits. *See Hoffman v. Arave,* 73 F.Supp 2d 1192 (D. Idaho 1998).

[2] The court of appeals held that Idaho's post-conviction statute, I.C. § 19-2719, did not operate as an independent and adequate state law ground sufficient to allow the federal court to procedurally default the claim. *See Hoffman,* 236 F.3d at 534. In reaching this conclusion, found

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on claim C, concluding that the pre-sentence investigation interview was a critical stage in the proceedings. The case was therefore remanded for a determination of whether the denial of counsel during the pre-sentence investigation constituted harmless error.[3]

Pursuant to the remand, this Court conducted a five day evidentiary hearing and, after the submission of post-hearing briefs, heard oral argument. The Court has considered the arguments of counsel and thoroughly reviewed the briefs, the state court record, as well as the testimony, evidence, and depositions submitted during the hearing. For the reasons stated below, the Court will grant relief as to the claim of ineffective assistance of counsel at sentencing, and denial of counsel at the pre-sentence interview. However, the Court denies the petition as to Hoffman's claim that he was denied effective assistance of counsel during plea negotiations, pre-trial proceedings, and trial.

FACTUAL HISTORY.

In September 1987, Denise Williams, a Nampa Police Department confidential informant, disappeared after making a controlled drug buy from Richard Holmes. The

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that Idaho allowed Hoffman only one opportunity to raise claim of ineffective assistance of counsel, and he was represented by trial counsel during that opportunity. *Id.* The court also noted that Idaho had adopted new regulations to prevent the situation from recurring, *Id.*

[3] The Court concluded that Hoffman was not entitled to *Miranda* warnings and to the assistance of counsel under the facts of this case because the pre-sentence interview because it was not a critical stage in the proceedings. *See Hoffman v. Arave*, 73 F.Supp 2d 1192, 1206 (D. Idaho 1998).

police investigation into her disappearance implicated Holmes and Ronald Wages. Both men were ultimately indicted on charges of conspiracy to commit murder. In an effort to secure a plea agreement, Holmes led the police to Williams' body.

Following the discovery of Williams' body, Wages confessed to the killing and became a witness for the State, giving them a full account of the murder, and implicating Hoffman. Hoffman and Wages were then charged with first degree murder.[4]

Hoffman's trial began on March 6, 1989. Hoffman was represented at trial by William Wellman and Charles Coulter. Wages was the principal witness against Hoffman at his preliminary hearing, and at trial.[5] He testified that he and Hoffman killed Williams on the orders of Holmes. He stated that Hoffman took Williams down into a cave near Silver City, Idaho and cut her throat. Despite her injuries, Williams was able to leave the cave under her own power. Wages then caught her and stabbed her, and both men buried her with rocks. At trial, the medical examiner testified that while either knife wound might have eventually killed Williams, it was a crushing blow from a rock that was the cause of death. Hoffman did not testify at trial.

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[4] The conspiracy charges against Holmes were dismissed, but he was subsequently charged with aiding and abetting in the crime of first degree murder. Three days after invoking his Fifth Amendment right to remain silent at Hoffman's preliminary hearing, he was killed by another prisoner at the state penitentiary. *See State v. Araiza*, 124 Idaho 82, 84, 856 P.2d 872, 874 (1993).

[5] In exchange for Wages's testimony, the State agreed not to seek the death penalty.

The jury found Hoffman guilty on March 16, 1989. Sentencing was initially set for May 12, 1989, but was continued to June 9, 1989, on Hoffman's motion.[6] On June 9th, the Court denied Hoffman's second motion to continue the sentencing.[7] The State presented testimony from six witnesses. Hoffman and Williams' father, Charles Fisher, were the only witnesses who testified for the defense. At the conclusion of the one day hearing, the Court sentenced Hoffman to death.

In pronouncing the sentence of death, the Court was required to make factual findings regarding mitigating and aggravating factors. Idaho Code § 19-2515(d). Prior to imposing the death sentence, the Court was required to find that all the mitigating factors, considered together, did not outweigh the gravity of each of the aggravating factors, considered separately. *See State v. Charboneau* 116 Idaho 129, 153, 774 P.2d 299, 323 (1989). In considering whether to impose the death penalty, the trial court found the following factors mitigated against the imposition of the death penalty:

1. Hoffman possesses skills and abilities and is able to function as a productive member of society.

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[6] In Idaho, capital sentencing is conducted by the trial judge. This statutory scheme was upheld by *Walton v. Arizona*, 497 U.S. 639 (1990), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, the United States Supreme Court recently granted certiorari in a case challenging the constitutionality of judge imposed capital sentencing. *See Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 865 (2002).

[7] Petitioner filed the motion to vacate because of the delay in delivering the pre-sentence report to his attorney. The court concluded that the majority of the information in the report had been furnished to Hoffman in discovery prior to trial, and denied the motion.

2. Hoffman is an excellent auto mechanic.

3. Prior to the commission of the murder, Hoffman had ingested methamphetamine and cocaine.

4. Hoffman was probably addicted to drugs and his supplier, Richard Holmes, was a manipulating person.

5. Hoffman is of normal intelligence, but is educationally deficient.

6. Hoffman exhibited appropriate conduct during trial, sentencing and at all appearances before the court.

7. Hoffman was able to form warm relationships with others, including children. Hoffman had a long time live-in girlfriend and formed bonds of friendship with the children of Richard Holmes.

8. Hoffman accepts responsibility for his own conduct and does not offer up excuses.

9. Hoffman feels strong bonds of loyalty to his friends.

10. Hoffman did not enjoy a normal childhood and upbringing.

11. Hoffman was institutionalized because of his long and repeated incarcerations at an early age.

The trial court found that two statutory aggravating factors existed which would support the imposition of the

death penalty.[8] First, the victim was a witness. Second, the killing was committed in a particularly heinous, atrocious, and cruel manner, exhibiting exceptional depravity. In support of that determination, the trial court made the following factual findings:

1. The victim knew she was going to be killed.
2. The victim did nothing to provoke the attack, which was slow and agonizing.
3. Hoffman slashed the victim's throat with the intention of killing her.
4. There was no proof to support Hoffman's claim that he didn't want to kill her.
5. The killing was performed in a gruesome, cruel and unusual manner.
6. Hoffman was a ward of the State of Illinois from an early age until age 16, and has been incarcerated on several occasions.
7. Hoffman has a long history of criminal conduct and has a history of violence with convictions for robbery, battery, kidnaping and murder.
8. Hoffman does not appear to have been rehabilitated by his prior incarcerations.

After finding that the two statutory aggravating factors, considered separately, outweighed the mitigating

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[8] The State also argued that two additional statutory aggravating factors should be applied: (1) the defendant showed "utter disregard" for human life, and (2) that the defendant, by his prior conduct, has exhibited a propensity to commit murder.

factors, considered cumulatively, the trial court imposed the death penalty.

PROCEDURAL HISTORY.

Hoffman initiated federal review on May 2, 1994, by filing a statement of issues, application for stay of execution, and appointment of counsel with this Court. A Petition for Writ of Habeas Corpus was filed on December 1, 1994. Following discovery and depositions of trial counsel, an Amended Petition was filed on April 2, 1996. The Petition asserted fourteen claims of constitutional error. On June 13, 1997, this Court entered a Memorandum Decision and Order dismissing several claims in the petition on the grounds they were procedurally defaulted.[9] *See Hoffman v. Arave,* 973 F.Supp 1152 (D. Idaho 1997).

On February 27, 1998, Petitioner filed a pro se motion to dismiss current habeas counsel, drop all further appeals and vacate the stay of execution. Petitioner also sought an injunction preventing counsel from filing documents on his behalf without his consent. On May 8, 1998, following a competency evaluation, the Court determined the petitioner was competent to dismiss his appeals. Petitioner then sought to reinstate his appeals, and on June 1, 1998, following a hearing, the Petition was reinstated. Following

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[9] The following claims were dismissed on the basis of procedural default: Claims B (to the extent the claim relied on the Fifth, Sixth and Eighth Amendments), D, E, H, J, K, M (to the extent the claim alleged denial of effective assistance of counsel), and N. In the alternative, Claims H, J, K were dismissed on the merits. Claim F was dismissed with prejudice for failure to state a violation of the Constitution or law or treaty of the United States.

oral argument, the Court denied the merits of the remaining seven claims on December 28, 1998.[10]

Following Petitioner's appeal, the case was remanded for a determination of whether he was denied his right to effective assistance of counsel in the state court proceedings, and whether the denial of counsel during the presentence interview was prejudicial. Since the remand was issued, Petitioner has filed two motions to waive his appeals, two motions to vacate the current stay of execution, two motions to dismiss counsel, and a motion to enjoin the Idaho Department of Corrections from coercing him into dismissing his Petition.

DISCUSSION

The following constitutes the Court's findings of fact and conclusions of law based on the evidence presented in this matter, and the relevant law.[11]

1. Claim M – Ineffective Assistance of Counsel

A. Standard of Review – Ineffective Assistance of Counsel

i. Generally

A defendant is constitutionally entitled to effective representation by counsel. A defendant challenging his counsel's performance at trial or at a capital sentencing proceeding as ineffective must meet a two-prong test.

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[10] Claims A, B, C, G, I, L, and M were dismissed on the merits.

[11] Unless otherwise indicated, the Court's factual findings are based on evidence available to Hoffman's trial counsel prior to the trial and sentencing.

Strickland v. Washington, 466 U.S. 668, 686-87 (1984). First, the defendant must show that counsel's performance was so deficient that he failed to function as the "counsel" guaranteed by the Sixth Amendment. *Id.* The second prong requires the defendant show that the deficient performance prejudiced the defense by establishing that counsel's errors were so serious as to deprive the defendant of a fair trial – a trial whose result is reliable. *Id.* Unless both showings are made, a defendant is not entitled to relief because it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

ii. Deficient Performance

In order to demonstrate that counsel was constitutionally ineffective, the defendant must show that counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Hensley v. Crist,* 67 F.3d 181, 184 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 688). Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *United States v. Ferreira-Alameda,* 815 F.2d 1251, 1253 (9th Cir. 1987) (quoting *United States v. Hamilton,* 792 F.2d 837, 839 (9th Cir. 1986)). To prevail on an ineffective assistance of counsel claim, a defendant must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was outside the "wide range of professionally competent assistance." *Clabourne v. Lewis,* 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting *Strickland,* 466 U.S. at 690).

In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, the Court does not view counsel's actions through "the distorting lens of hindsight." *Hendricks v. Calderon,* 70 F.3d 1032, 1036 (9th Cir. 1995) (quoting *Deutscher v. Whitley,* 884 F.2d 1152, 1159 (9th Cir. 1989), *vacated on other grounds, Angelone v. Deutscher,* 500 U.S. 901 (1991)). A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *See Strickland,* 466 U.S. at 690. An attorney's actions must be examined according to what was known and reasonable at the time the attorney made his choices. *Id*; *see also Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995). Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel. *Hensley,* 67 F.3d at 185; *Hughes v. Borg,* 898 F.2d 695 (9th Cir. 1990).

iii. Prejudice

In evaluating the second prong of the test, the Court must assess whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Hensley*, 67 F.3d at 184 (quoting *Strickland*, 466 U.S. at 694). The "prejudice" component of the *Strickland* test focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.,* 466 U.S. at 687. The defendant must also show that the deficient performance prejudiced the defense and made the trial results unreliable. *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986) ("The essence of an ineffective assistance claim is that counsel's

unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *see also Hensley,* 67 F.3d at 184.

The defendant must show that as a result of the errors, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 693-94. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

B. Specific Claims of Ineffectiveness

Hoffman contends that his trial counsel was ineffective in several respects: (1) failing to challenge Hoffman's competency to stand trial, (2) failing to request funding for investigators and experts to establish his mental disease, (3) advising him to reject a plea agreement which would have precluded the death penalty because of counsel's belief that the death penalty would not be imposed because recent court decisions suggested it was unconstitutional, and (4) failing to investigate and present his significant mental deficits and an abusive childhood as mitigation evidence at sentencing.

i. Competency

There is no question that Hoffman suffered from mental, intellectual and drug abuse problems in the years leading up to the murder of Denise Williams. Hoffman was raised in a violent and abusive household, and was both a victim of abuse, and exposed to the abuse of his siblings. After his father's death when Hoffman was 10 years old,

Hoffman's mother placed him in foster care because of his behavior problems. Hoffman was admitted to the Metropolitan State Hospital in California, when he was 24 years old, and was diagnosed with "psychosis manifested by delusional and violent behavior," and anti-social personality disorder.

Hoffman also has significant problems learning, and is not well-educated. At the time of the offense Hoffman could not read or write, and could not be taught to read or write. Hoffman has had numerous IQ tests over the years. The most recent testing indicated that Hoffman's IQ is 74, This puts Hoffman in the borderline mentally retarded range.

Hoffman has a significant history of drug and inhalant abuse. At age 15, he was inhaling substances such as gasoline and airplane glue. His drug use as an adult includes repeated use of methamphetamine and cocaine. Prior to the commission of the murder Hoffman ingested methamphetamine and cocaine. Part of the methamphetamine was injected intravenously.

With this history of mental, intellectual, and substance abuse problems, the Court must consider whether counsel's failure to raise issues related to those problems or to investigate the nature and extent of those problems prior to trial constituted the type of deficient performance which would support a finding of ineffective assistance of counsel which justify the granting of relief under *Strickland.* For the reasons stated below, the Court concludes that it does not.

a. Competency to stand trial[12]

At trial and sentencing, Hoffman was represented by lead counsel, William Wellman, and co-counsel, Charles Coulter. Coulter was appointed three weeks before trial. Neither Wellman nor Coulter had handled a capital case prior to the Hoffman trial. Wellman and Coulter were aware of Hoffman's significant mental deficits, including his inability to read and write, and his difficulty communicating and comprehending information.

However, Hoffman was able to provide Wellman with details of the murder. Because, Hoffman was able to provide a coherent description of how the murder occurred, as well as the role he played in the murder, Wellman made a strategic decision not to pursue the issue of whether Hoffman was competent to stand trial. In short, Wellman concluded that he could not make a credible argument that Hoffman was not competent to stand trial. The Court finds that Wellman and Coulter's decision not to pursue competency issues at trial was reasonable based on the information available to them at the time of the trial, on Hoffman's behavior and recollection of the facts surrounding the events, and on the minimal standard necessary to show lack of competency to stand trial in Idaho.[13]

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[12] The issue of Hoffman's claim of deficient performance for counsel's failure to raise competency as a mitigating factor at sentencing will be addressed below.

[13] In Idaho, competency to stand trial is a two-pronged test. First, a defendant must be competent to both understand the proceedings against him and assist in his own defense. I.C. § 18-210; *State v. Powers*, 96 Idaho 833, 842, 537 P.2d 1369, 1378 (1975). Second, the trial judge is under a continuing duty to observe a defendant's ability to

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However, Hoffman also claims that even if the information available to Wellman and Coulter justified a decision not to pursue a claim that Hoffman was not competent to stand trial, their performance was nevertheless deficient because they failed to adequately investigate the issue. It is true that Wellman and Coulter did not request funding for an independent mental health expert to determine Hoffman's mental condition and whether any such defenses were available. This decision was based on the limited resources available to them, and because they felt that they could not, based on the information then available, make a good faith argument that there was any issue related to Hoffman's competence which would justify further investigation into this issue.

Defense counsel has a duty to make a reasonable decision as to whether an investigation is necessary. *See Hendricks,* 70 F.3d at 1036 (citations omitted). The failure to conduct any investigation of a defendant's background may fall outside the scope of reasonable professional assistance. *Thompson v. Wainwright,* 787 F.2d 1447, 1452 (11th Cir. 1986). "In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 689. "Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, . . . counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about

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understand the proceedings against him. *State v. Potter,* 109 Idaho 967, 969, 712 P.2d 668, 670 (Ct. App. 1985).

how best to represent his client." *Hendricks,* 70 F.3d at 1036 (quoting *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994)). Counsel is ineffective where the attorney neither investigates, nor demonstrates a strategic reason for failing to do so. *Id.*

The Court concludes that Wellman and Coulter's failure to investigate the nature of Hoffman's mental deficits and illiteracy as a basis for competency to stand trial does not constitute deficient performance. Based upon Hoffman's ability to communicate with them and his ability to relate specific details of the crimes, Wellman and Coulter made a reasoned decision that further investigation was unlikely to reveal evidence which would enable them to make a credible argument that Hoffman was unable to understand the nature of the proceedings or assist in his own defense. The Court concludes that this decision was based on reasonable professional judgment, which does not fall below an objective standard of reasonableness. *See Clabourne,* 64 F.3d at 1377.

However, even if Wellman and Coulter's performance was deficient, Hoffman has not been able to establish the second prong of the *Strickland* test – that the failings of counsel was prejudicial. At the evidentiary hearing, Hoffman presented the testimony of a neuropsychiatric expert, Dr. James Merikangas, to support his claim that counsel was ineffective for failing to pursue competency issues. Dr. Merikangas opined that Hoffman suffered from a psychotic disorder due to brain injury and malformation, which had existed prior to the murder of Denise Williams. Dr. Merikangas' conclusion was based on the results of two

Magnetic Resonance Imaging (MRI) scans of Hoffman's brain, one from 1996, and the other from 2001.[14]

In 1996, radiologist Dr. J.T. Hall of Boise, found that the MRI scan indicated Hoffman's brain was within normal parameters. *See Respondent's Exhibit 3.* The 2001 MRI showed no change from the 1996 MRI. Dr. Merikangas testified that the 1996 MRI was incorrectly interpreted and that correct interpretation of both scans indicated that Hoffman suffered from a psychotic disorder due to brain injury and malformation. Respondent presented testimony from Dr. Robert Smith, a neurosurgeon, who opined that the MRI scans from 1996, and 2001, did not show a brain defect or injury which would cause a psychotic disorder.

The Court finds the testimony of both experts to be credible. However, based on the conflicting testimony of Drs. Merikangas and Smith, as well as the report from Dr. Hall interpreting Hoffman's 1996 MRI as normal, the Court finds no prejudice resulted from Wellman and Coulter's failure to request funds for an MRI because it is unclear that such testing in 1988 and 1989 would have revealed anything about Hoffman's mental status which could have been used to challenge Hoffman's competence. Thus, Hoffman has also failed to establish the critical second prong of the *Strickland* test; namely that he was prejudiced by Wellman and Coulter's failure to further investigate the issue of Hoffman's competence to stand trial.

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[14] MRI scans were available in Idaho at the time of Hoffman's trial.

Hoffman also makes a related claim that Wellman and Coulter's performance was deficient because they did not seek funds to hire a mental health expert at trial. Wellman and Coulter based their decision on their belief that the Court would refuse any such request. Research into the relevant law regarding mental health issues and the right to expert assistance as it related to the defense of a first degree murder charge and potential death penalty may have led them to seek funds. However, they did not conduct this research and by failing to ask for funds, Wellman and Coulter waived this issue on appeal. Therefore, although Wellman and Coulter's decision was based on a reasonable belief, standards of professional competent assistance required them to request funds which would allow for an adequate investigation, or to preserve the issue for appeal. *See Hendricks,* 70 F.3d at 1036.

However, again Hoffman has not been able to show that the lack of access to a mental health expert during trial resulted in any prejudice. The Court has not been provided with any concrete examples of how the lack of a mental health expert resulted in difficulties for the defense team. Without such a showing, the Court cannot find there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 693-94.

b. Diminished Capacity as a Defense at Trial

Wellman considered presenting a diminished capacity defense, but was dissuaded by the makeup of the jury pool

in Owyhee County.[15] As a result, Wellman did not develop any facts concerning Hoffman's substance abuse at the time of the offense and long-term abuse, and did not seek to obtain the services of an expert on this issue. However, Hoffman has failed to establish that his use of drugs, rendered his state of intoxication at the time of the murder so great as to preclude the finding of intent required for first degree murder. The Court finds that Wellman's tactical decision not to present a diminished capacity defense was reasonable based on the information available to him about the jury pool in Owyhee County. Wellman's decision not to raise the defense of diminished capacity was a strategic decision that was not outside the range of professionally competent assistance. *See Hensley*, 67 F.3d at 185. Moreover, Hoffman has failed to show that Wellman's decision resulted in any prejudice. Given Hoffman's failure to satisfy either prong of the *Strickland* test, it is clear he has not established that Wellman and Coulter's failure to raise a diminished capacity defense at trial denied him his constitutional right to effective assistance of counsel.

ii. Plea Negotiations

Prior to March 6, 1989, acting Owyhee County prosecutor Michael Kane tendered an unwritten plea offer to Hoffman. The offer provided that if Hoffman would plead

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[15] If a specific intent is a necessary element of the crime charged, a jury may take intoxication into account in determining whether the defendant was capable of forming such intent when the crime was committed. *See State v. Hall*, 111 Idaho 827, 834, 727 P.2d 125, 1262 (Ct. App. 1987); *see also State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

guilty to one count of murder in the first degree, the State would not seek the death penalty. Kane also indicated that he would seek the death penalty upon conviction if the plea offer was refused.

Wellman advised Hoffman not to accept the offer, because he thought Idaho's death penalty statute would be found unconstitutional. His advice was based on the decision by the Ninth Circuit Court of Appeals in *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988), which held that Arizona's death penalty statutory scheme, nearly identical to Idaho's, was unconstitutional. Hoffman declined the plea offer on Wellman's advice. After Wellman gave this advice, *Adamson* was overturned by *Walton v. Arizona,* 497 U.S. 639 (1990), which upheld the constitutionality of Arizona's death penalty scheme.

However, Wellman properly relied on *Adamson* in advising Hoffman to reject the plea offer. *Walton* was not decided until the year after Hoffman's trial and sentencing. Clearly, *Strickland* does not require that counsel be clairvoyant in discerning future decisions of the United States Supreme Court. Wellman's advice, based as it was on a binding decision of the Ninth Circuit Court of Appeals, did not constitute deficient performance.

iii. Mitigation Evidence at Sentencing[16]

Turning then to Hoffman's claim that Wellman and Coulter failed to develop sufficient evidence in mitigation

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[16] At sentencing, mitigating evidence consisted of anything about the crime, the circumstances surrounding it, or the defendant and his background which might persuade the trial court that the death penalty was not warranted.

at his sentencing, the Court notes that the Ninth Circuit has established a rigorous standard which substantially eases a petitioner's burden of establishing ineffective assistance of counsel. For example, the court of appeals has indicated that all relevant mitigating information should be unearthed for consideration at the capital sentencing phase. *Smith v. Stewart,* 241 F.3d 1191, 1198 (9th Cir. 2001); *Wallace v. Stewart,* 184 F.3d 1112, 1117 (9th Cir. 1999). Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel. *Bean v. Calderon,* 163 F.3d 1073, 1079 (9th Cir. 1998). After a sufficient investigation, "counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation." *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir. 1985) (quoting *Stanley v. Zant,* 697 F.2d 955, 965 (11th Cir. 1983)). However, defense counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *Smith,* 241 F.3d at 1198 (citing *Williams v. Taylor,* 529 U.S. 362, 396 (2000)). Counsel has an obligation to conduct a thorough investigation of a defendant's background. *See Williams,* 529 U.S. at 396 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation). Under this heightened standard, the Court concludes, for the reasons explained below, that Hoffman was deprived of his right to effective assistance of counsel at sentencing.

a. Psychological Evaluation

Wellman and Coulter did undertake to prepare and present some evidence in mitigation at sentencing. For

example, they requested and received funds to obtain a psychological evaluation from Dr. Dave Sanford. They did not give Dr. Sanford any background information on Hoffman, but did give him a list of issues to be explored which came from the statutory sentencing factors. However, Dr. Sanford was not given specific direction to look for certain mitigating factors. Nor was he asked to help them develop other avenues of possible mitigation evidence.

Dr. Sanford's evaluation indicated that Hoffman had a lengthy history of drug abuse, evidence of injury or trauma to the left hemisphere of the brain, neurological damage to the left hemisphere of the brain, most likely secondary to a closed head injury and a long-standing substance abuse history. Dr. Sanford's evaluation also concluded that Hoffman denied responsibility for the crime, was inclined to transfer blame for his predicament to others, and could not control his behavior or conform his conduct to the law. Significantly, Dr. Sanford diagnosed Hoffman as having anti-social personality disorder. Based on Dr. Sanford's evaluation, Wellman and Coulter made a tactical decision not to present the evaluation at sentencing because Dr. Sanford's report, including a diagnosis of anti-social personality disorder, undermined their strategy of portraying Hoffman as being remorseful and accepting responsibility for the crime. Wellman and Coulter did not consult with any additional mental health experts after receiving Dr. Sanford's evaluation.

At the evidentiary hearing, Wellman conceded that neurological brain damage resulting from either a closed head injury or substance abuse as reported by Dr. Sanford's evaluation would have been mitigating evidence. Wellman also testified that he was aware a finding of

borderline intellectual functioning was a possible mitigating factor. However, Wellman did not present evidence of neurological brain damage, or borderline intellectual functioning at sentencing. The failure to present this relevant mitigating information to the trial court regarding Hoffman's borderline mental retardation and other mental deficits at sentencing, including illiteracy, constitutes deficient performance. *See Williams,* 529 U.S. at 397-98, *see also Smith,* 241 F.3d at 1198.

The Court also concludes that this deficient performance was prejudicial to Hoffman. The trial court found him to be of average intelligence, though educationally deficient, when, in reality, his borderline mental retardation and mental deficits clearly put him outside the area of "adequate intelligence." Hoffman was not merely "educationally deficient," but instead was illiterate and virtually unteachable. Of all the various mitigating factors which may weigh against the imposition of the death penalty, a finding that the accused is mentally retarded may be paramount. Indeed, the United States Supreme Court has granted a writ of certiorari for the very purpose of considering "whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?" *Atkins v. Virginia,* 122 S.Ct. 29 (2001) (amending prior order granting petition for writ of certiorari). Given the critical role which mental retardation must play as a mitigating factor in determining whether the death penalty should be imposed, the Court must conclude that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 693-94. Counsel's failure to adequately inform the

sentencing judge of Hoffman's lack of mental ability was clearly prejudicial.

b. Witnesses

Wellman and Coulter did not gather any genealogical, medical, school, institutional, psychological, psychiatric, prison or employment records prior to sentencing. Wellman did gather a general life history from conversations with Hoffman, his mother, Gladys Hoffman, Wages, and Hoffman's girlfriend, Dawn Williams. However, at sentencing, this evidence was not presented. Debra Holmes-Taylor, the widow of Holmes, and Frank and Linda Herring, Hoffman's former employers were not interviewed by Wellman or Coulter prior sentencing. Dawn Williams, Holmes-Taylor, and the Herrings each testified at the hearing that they would have testified at sentencing about Hoffman's kind nature, as well as his need to be accepted. Gladys Hoffman would have testified to Hoffman's physical and psychological abuse from an alcoholic father.

Wellman and Coulter's failure to gather these necessary records, conduct interviews and present relevant mitigating evidence about Hoffman's significant mental deficits and troubled childhood, resulted in critical information not being presented to the trial court. As a result, their representation falls below the acceptable level in a capital case. The effect of this failure to conduct and present interviews was that the trial court concluded that Hoffman did not enjoy a normal childhood and upbringing. This was clearly prejudicial to Hoffman since those available witnesses could have testified to the full extent of childhood abuse and abandonment. Again, the Court

concludes "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 693-94.

c. Investigation

At the hearing, Wellman and Coulter testified that they would have pursued Sanford's evaluation if they had the resources. However, they did not seek additional funds for neurological testing. In addition, they did not request funding from the court for an investigator, nor did they research the case law surrounding the necessity of an investigator in a capital case.

Wellman and Coulter did not conduct a reasonable investigation into Hoffman's background in preparation for sentencing. Given their awareness of Hoffman's mental deficiencies, and the availability of relevant mitigating evidence, their failure to seek additional funding for investigation to present additional mitigating evidence and witnesses fell below the acceptable level of representation in a capital case, and constitutes deficient performance. *See Hendricks,* 70 F.3d at 1036 (counsel is ineffective where he is on notice that his client is mentally impaired and yet counsel fails to investigate the mental condition as a mitigating factor in sentencing). Hoffman suffered prejudice as a result of counsel's deficient performance, since a reasonable investigation would have allowed counsel to present evidence refuting some of the trial court's findings – most critically, the finding that Hoffman was a person of normal intelligence. *See Williams,* 529 U.S. at 397-98; *see also Smith,* 241 F.3d at 1198. There is a reasonable probability that had all the available evidence

been presented, the result of the sentencing proceeding would have been different. *See Strickland,* 466 U.S. at 694. Accordingly, the Court concludes that counsel's failure to adequately investigate Hoffman's background also violated his constitutional right to effective assistance of counsel.

2. Claim C - Deprivation of Counsel at the Pre-Sentence Investigation Interview

In his habeas petition Hoffman claimed that the trial court deprived him of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by failing to allow his counsel to be present for the Pre-Sentence interview. This claim was not raised on direct appeal or in the appeal of the denial of his post-conviction relief petition before the Idaho Supreme Court, but was not procedurally defaulted. *See Beam v. Paskett,* 3 F.3d 1301, 1306-07 (9th Cir. 1993) (sentencing errors are implicitly raised under Idaho's death penalty statute).

The Court dismissed the claim on the merits, finding that Hoffman's Pre-Sentence Interview did not constitute a "critical stage" of the proceedings, and that the deprivation of counsel during the interview did not violate the Hoffman's constitutional rights. *See Estelle v. Smith,* 451 U.S. 454 (1981) (competency interview was a "critical stage" of the proceedings during which the defendant was entitled to his Miranda warnings and to the assistance of counsel.)

The court of appeals reversed, holding that the pre-sentence interview was a critical stage of the proceedings for the purpose of Hoffman's Sixth Amendment right to

counsel.[17] *See Hoffman,* 236 F.3d at 539-40. Having concluded that Hoffman's Sixth Amendment right was violated by denial of counsel at the Pre-Sentence Interview, the court of appeals remanded the issue to this Court to determine if the denial of the right constituted a harmless error under *Brecht v. Abrahamson,* 507 U.S. 619 (1993). *Id.*

At the evidentiary hearing, Wellman testified that he filed a motion to appear at the Pre-Sentence Interview, which was denied. He further testified that if he had been at the interview he would have intervened to prevent Hoffman from stating that he had been present at two other murders. After receiving the Pre-Sentence Report, Wellman and Coulter permitted Hoffman to testify at sentencing despite grave concerns about his mental deficiencies. Hoffman testified to his participation in the offense charged, and implicated himself in other illegal activities. At the time Hoffman testified, Wellman and Coulter knew that Hoffman did not understand the legal complexities involved, and was unable to understand that the admissions he was going to make were sufficient to conclude that he was guilty of first degree murder. Wellman and Coulter only presented two witnesses at sentencing, one of whom was Hoffman. Based on the testimony at the hearing, the Court finds that Wellman and Coulter's sentencing strategy was dictated, in part, by the damaging information Hoffman revealed in the

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[17] Hoffman had raised this claim as a Fifth and Sixth Amendment violation. The court of appeals denied relief on the Fifth Amendment claim, holding that Hoffman had been apprised of his right to remain silent and had voluntarily waived it by speaking to the investigator. *See Hoffman,* 236 F.3d at 538.

Pre-Sentence Investigation interview, and that Hoffman's testimony at sentencing was detrimental to his case. The Court concludes that Hoffman's incriminating statements during the Pre-Sentence Interview had a substantial impact on his counsel's sentencing strategy. Therefore, the error which resulted in denial of counsel at the Pre-Sentence Investigation Interview was not harmless and Hoffman is entitled to relief on this claim.

CONCLUSION.

On remand, and following an evidentiary hearing and review of the record, the Court concludes that Hoffman is entitled to relief on two claims in the Amended Petition. First, Hoffman has established his claim of ineffective assistance of counsel at sentencing. Second, the constitutional violation of denial of counsel at the Pre-Sentence Interview was not harmless, and Hoffman is entitled to relief on this issue as well. Hoffman has not supported his claim of ineffective assistance of counsel at trial for failing to challenge his competency to stand trial or failing to present a diminished capacity defense. The evidence in the record, and adduced at the hearing, supports counsel's strategic decision not to challenge competency. Hoffman has also failed to support his claim of ineffective assistance of counsel for ignorance of the law regarding the constitutionality of the death penalty, which led to a rejection of a plea offer.

ORDER

Based on the foregoing, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that:

1) Hoffman's Petition for Writ of Habeas Corpus (dkt. #50) is **GRANTED**. The State of Idaho has 120 days from the date of this Order to re-sentence the petitioner.

Dated this 30th day of March, 2002.

/s/ B. Lynn Winmill
HONORABLE B. LYNN WINMILL
CHIEF JUDGE,
UNITED STATES DISTRICT COURT

481 F.3d 686

United States Court of Appeals, Ninth Circuit.
Maxwell HOFFMAN, Petitioner-Appellant,
v.
Arvon J. ARAVE, Warden, Idaho Maximum Security Institution, Department of Correction, State of Idaho, Respondent-Appellee.
No. 02-99004.

March 6, 2007.

Ellison M. Matthews, Esq., Matthews Law Offices, Boise, ID, Joan M. Fisher, Esq., Federal Defenders of Eastern Washington & Idaho, Moscow, ID, for Petitioner-Appellant.

L. Lamont Anderson, Esq., AGID-Office of the Idaho Attorney General, Boise, ID, for Respondent-Appellee.

Before HARRY PREGERSON, WILLIAM A. FLETCHER, and RONALD M. GOULD, Circuit Judges.

ORDER

The panel, as constituted above, have voted unanimously to deny both the petition for rehearing and the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of votes of the active judges in favor of en banc rehearing. The petition for rehearing and the petition for rehearing en banc are denied.

BEA, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, KLEINFELD, TALLMAN, BYBEE and CALLAHAN, Circuit Judges, join, dissenting from the denial of rehearing en banc.

The panel's decision has effectively written out of the law the requirement that prejudice be pleaded and proved to meet the test for ineffective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Turner v. Calderon,* 281 F.3d 851, 879 (9th Cir. 2002). In fact, Hoffman alleged only that had his ineffective counsel made Hoffman competent, Hoffman would then have been able to assess his position and then decide whether to take the plea offer.[1] He did not allege that if competent and if counsel had advised him to take the plea offer, he would have done so.

Further, in what may be a new high in self-effacing candor, the panel holds that it is ineffective assistance of counsel to rely on Ninth Circuit precedent with respect of federal constitutional law applicable in states located in this Circuit. Therefore, I respectfully dissent from the order denying rehearing en banc.

Hoffman and an associate, Ron Wages, killed Denise Williams, a police informant, after Williams made a controlled drug buy which resulted in the arrest of Richard Holmes. *State v. Hoffman,* 123 Idaho 638, 851 P.2d 934, 935-36 (1993). On Holmes's orders, Hoffman and Wages kidnaped Williams and drove her to a cave outside Silver City, Idaho. *Id.* at 936.

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[1] Hoffman alleged in his habeas petition:

> Had Petitioner been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood Petitioner's mental state including his brain damage, dyslexia, mental illness including psychosis, and mental retardation, counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

Hoffman took Williams into the cave and slashed her throat with a knife. As Hoffman was returning to the vehicle, Wages spotted Williams crawling up an embankment near the cave. Wages then pursued Williams and stabbed her under the arm with Hoffman's knife. Thinking Williams was dead, both men buried her with rocks. It would later be determined that the cause of death was a crushing blow by a rock to William's head.

Id.

Hoffman was charged with first degree murder and offered a plea bargain: if Hoffman pleaded guilty to murder, the state would not seek the death penalty. *Hoffman v. Arave,* 455 F.3d 926, 929 (9th Cir. 2006). However, Hoffman's attorney, William Wellman, advised Hoffman to reject the plea. *Id.* This court had held Arizona's death penalty scheme unconstitutional because in Arizona, as in Idaho, the death sentence was imposed by a judge, not a jury. *Adamson v. Ricketts,* 865 F.2d 1011, 1023-28 (9th Cir. 1988) (en banc), *abrogated by Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Wellman thought it was only a matter of time before Idaho's death penalty scheme would also be held unconstitutional. *Hoffman,* 455 F.3d at 929. Hoffman let the plea offer lapse, and was tried and sentenced to death. *Id.* at 930. A year after the sentence was imposed, the Supreme Court upheld Arizona's judge-sentencing death penalty scheme and implicitly overruled *Adamson. Walton,* 497 U.S. at 647-49, 110 S.Ct. 3047.

The panel held Wellman provided ineffective assistance of counsel when he advised Hoffman to reject the plea agreement. *Hoffman,* 455 F.3d at 939-41. Ineffective

assistance of counsel requires both a showing that counsel's performance was deficient and that such deficient performance caused defendant prejudice. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. The panel found that Wellman's performance was deficient because, while he was correct that Idaho's death penalty scheme was "materially indistinguishable" from Arizona's, Wellman did not discover that the Supreme Court of Arizona consistently upheld Arizona's death penalty scheme. *Hoffman,* 455 F.3d at 940. But *Adamson* was good law while the plea bargain was available. The Idaho Supreme Court had not rejected our *Adamson* position, and, in a pre-AEDPA world, our decision would have made federal habeas relief for Hoffman likely.[2] There is no evidence that had Wellman researched Arizona and Idaho state court rulings he would still not have relied on our *Adamson* decision. The panel opinion rather astonishingly holds that it is deficient performance for an attorney to rely on the decisions of this court with regard to federal constitutional rights in states located in the Ninth Circuit.

By holding that failing correctly to predict future court decisions or trial court actions constitutes deficient performance, the panel is opening this court up to a cavalcade of challenges. Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the

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[2] Of course, Wellman's advice ultimately proved to be correct. Only his timing was wrong. The Supreme Court reversed *Walton* in 2002 in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), ruling that a jury must find aggravating circumstances necessary for the imposition of the death penalty. However, Hoffman is not helped by *Ring*; it is not retroactive. *Schriro v. Summerlin,* 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

court's constitutional holdings, has a claim for deficient performance. And yet, how often does an attorney give advice that does not in some way predict future court action?

After erroneously finding deficient performance, and in the absence of any allegation of prejudice, the panel finds prejudice because "had Wellman fully presented Hoffman's options and told Hoffman that he was giving up very little in exchange for the security of the death penalty being off the table, *Hoffman probably would have gone along with Wellman's suggestion* and would have accepted the plea agreement." *Hoffman,* 455 F.3d at 942 (emphasis added). The panel also noted that "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement." *Id.*

The panel opinion supplants the requirement of pleading and proof of prejudice, *i.e.,* that but for Wellman's incorrect advice he would have pleaded to a life sentence, by creating a new vehicle to establish prejudice: that defendants' rejections of plea agreements are invalid unless the *state* proves defendant based his rejection on a "principled stand." The panel did not favor us with any authority for this invention, nor with a description of what principles erect an adequate foundation to effect a "principled stand." Does the "principle" upon which defendant "stands" in his rejection have to be rationally probable, vaguely possible, or can it be simple defiant disdain for the authorities?

Up to now, under our jurisprudence, Hoffman would have to demonstrate that "but for counsel's errors, *he would have pleaded guilty* and would not have insisted on going to trial." *Turner,* 281 F.3d at 879 (emphasis added).

In fact, "[w]hile a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction, and the high stakes for the defendant require the utmost solicitude." *Florida v. Nixon,* 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (internal quotation marks and citations omitted). Requiring a "principled stand" to validate a refusal to enter a plea agreement hardly demonstrates "the utmost solicitude" for a defendant's choice. To the contrary, it creates a barrier to effective pleading out.

The panel relies on Hoffman's "compliant personality" and tendency to defer to Wellman throughout the trial to establish that "Hoffman probably would have gone along with Wellman's suggestion" to accept the plea agreement. *Hoffman,* 455 F.3d at 942. However, *Hill v. Lockhart,* 474 U.S. 52, 59-60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), requires more: (1) an allegation in the habeas petition that but for counsel's ineffective assistance, petitioner would have pleaded guilty and (2) proof – not just post-hoc appellate court speculation – that the petitioner indeed would have accepted the plea agreement had the attorney correctly advised the petitioner.

In *Hill,* the Supreme Court affirmed the district court's denial without an evidentiary hearing of Hill's habeas petition because Hill did not satisfy the "prejudice" requirement for ineffective assistance of counsel claims. Hill claimed ineffective assistance of counsel because his attorney informed Hill he would be required to serve only one-third of his sentence before becoming eligible for parole. *Id.* at 54-55, 106 S.Ct. 366. In fact, as a second offender, Hill was required to serve at least one-half of his sentence before becoming eligible for parole. *Id.* at 55, 106 S.Ct. 366. The Court held that Hill "failed to allege the

kind of 'prejudice' necessary to satisfy the second half of the *Strickland v. Washington* test." *Id.* at 60, 106 S.Ct. 366.

Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.

Id. The Court concluded, "[b]ecause petitioner in this case failed to allege the kind of 'prejudice' necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim." *Id.*

In this case, Hoffman did not meet the *Hill* requirement that he allege that he would have accepted the plea agreement if Wellman had "properly" advised him as to the law and the judge's propensity on death sentences. In fact, were the allegations of Hoffman's habeas petition taken as true to test their legal sufficiency, it remains unclear whether Wellman's allegedly deficient advice actually caused Hoffman to turn down the plea offer. First, Hoffman alleged that he "proceeded to trial due to the advice of trial counsel that he would not be executed regardless of the outcome." But then Hoffman alleges:

> Had Petitioner been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood Petitioner's mental state including his brain damage, dyslexia, mental illness including

> psychosis, and mental retardation, counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

Note that Hoffman does not allege that had he become competent through adequate care and treatment, he would have *taken* the plea offer. All he alleges is that, if so cured, he would have been "sufficiently competent *to determine*" whether to take the plea.

It appears that Hoffman has here pleaded himself into a corner.[3] Even if he had been given "good" advice by Wellman, Hoffman alleges he wasn't competent to take it. And of one thing we can be sure: Wellman did not render ineffective assistance by failing to challenge Hoffman's competency: "Hoffman has not proved an ineffective assistance claim based on his counsels' failure to challenge his competency because there is not a reasonable probability that Hoffman would have been found incompetent." *Hoffman,* 455 F.3d at 938. So, there is no causal connection between Wellman's supposedly ineffective assistance in predicting constitutional law and Hoffman's refusal to plead guilty. Hoffman claims he was incompetent to follow Wellman's advice, let alone that he could have rejected it and pleaded guilty.

This pleading has a further effect. Before pleading he was incompetent to take the plea, through counsel's ineffective assistance, Hoffman had alleged that he had

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[3] A petitioner can plead inconsistent theories. But here Hoffman has not done so. He never pleads that if he had become competent, he would have taken the plea, nor that, in the alternative, he was competent to take the plea.

rejected the plea agreement "due to the advice of trial counsel." Hence, he was (1) competent to *reject* the plea but (2) not competent to *take* the plea, all during the same ten-day period in February 1988.

Moreover, Hoffman did not offer any *proof* that he was prejudiced by Wellman's advice. Hoffman could have offered an affidavit, deposition testimony or evidentiary hearing testimony that he would have taken the guilty plea had he been given the correct advice. He did not do so. If the bar for defective performance is as low as the panel sets it, a showing – that is, pleading and proof – of prejudice is absolutely required lest we be forced to find ineffective assistance of counsel in every case where an attorney makes a prediction about law or judges and the prediction turns sour.

En banc rehearing was necessary because not only does the panel find deficient performance in an attorney's failure correctly to predict future court decisions (the Crystal Ball Rule), the panel finds prejudice in a mere supposition by this court that the defendant would have taken the plea had his attorney guessed correctly. Accordingly, I respectfully dissent from the denial of rehearing en banc.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

MAXWELL HOFFMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.
A.J. ARAVE, Warden of the	)	CV 94-0200-S-BLW
Idaho Maximum Security	)	VOLUME II
Institution,	)	
Department of Correction,	)	
State of Idaho,	)	Pages 199-379
Respondent.	)	

EVIDENTIARY HEARING

BEFORE THE HONORABLE B. LYNN WINMILL AT BOISE, IDAHO

OCTOBER 31, 2001

COURT REPORTER: LISA K. YANT, CSR, RPR
Official Court Reporter

* * *

DIRECT-WELLMAN

[268] Q. I want to shift back for just a moment, Mr. Wellman. Was there any time prior to trial when you engaged in plea negotiations with the State in this matter?

A. Yes.

Q. And when was that?

A. That would have been about five weeks or so prior to the start of the trial, four or five weeks prior to the start of trial in February of 1989.

Q. Can you describe for the Court the result of the plea negotiations?

A. The plea negotiations did not result in any resolution of the trial phase of the case.

Q. Was there any offer less than death made to Mr. Hoffman if he pled guilty to any offense?

A. My recollection is that if Max would have pled guilty to first-degree murder, that the State would have not sought the death penalty. I cannot recall that being in a written form, but rather a process of discussions. Again, you need to recognize that the players on the law enforcement side in this case were the State's attorney general who was the prosecuting officer by special appointment, the Owyhee County Sheriff's Office and then the Nampa Police Department.

My initial discussions were obviously informal with the law enforcement people. And they made it pretty [269] clear to me that Mr. Kane, the prosecutor in the matter, would be the person through whom any deals were negotiated. And we had some discussions, but my sense is that if Max would have pled to first-degree murder, the State would not have sought death.

Q. Was that offer made?

A. I think it was made.

Q. Was it accepted?

A. No.

Q. Why was it not accepted?

A. Because I didn't think Max was going to be subject to the death penalty based upon a decision that the Ninth Circuit had sent down.

Q. And that decision was what?

A. I think it is Ricketts.

Q. Adamson v. Ricketts?

A. Yes.

Q. How much research had you done on the Adamson v. Ricketts case?

A. Well, I had read the decision, but unfortunately I didn't follow it going up to the U.S. Supreme Court.

Q. So based on your understanding that – well, what was your understanding of the law as it was affected by Adamson v. Ricketts?

A. Well, again, this is pretty dated and I have to [270] indicate that I haven't looked at it, but my sense was that the element of the heinous and cruel was stricken because of vagueness. And I can't remember if there was any other corresponding aggravating factor that Ricketts talked about or if there was some – my sense was that the Ricketts statutory scheme paralleled the Idaho scheme. And as I sit here today, my sense is that Ricketts was stricken by the Ninth Circuit. And I just drew a parallel to Idaho's statutory scheme and through the conclusion that under this particular case, we wouldn't see Max get a death sentence.

Q. Do you recall any jury trial issue in the Adamson v. Ricketts case?

A. You mean as far as jury sentencing?

Q. Correct.

A. Now that you mention it, that may have been one of the factors as well.

Q. And based on your understanding of Adamson v. Ricketts, did you discuss the offer with Mr. Hoffman?

A. My sense and recollection is that I did, but I think I advised him to not take the offer because I didn't think the case law would support a death sentence at that time.

Q. And did Mr. Hoffman follow your advice?

A. He did not – yes, he did not take the offer.

Q. And was Mr. Hoffman's deferment to your decision-making, was that – well, describe for me the [271] relationship between you and Mr. Hoffman in your decision-making process in your representation of Mr. Hoffman.

A. It was, it was typically my advice to him and I think Max saying, "Well, Bill, you are the lawyer, you know, you know more about it than I do."

* * *

CROSS-WELLMAN

[344] Q. You had an offer from the State prior to trial to resolve the case, correct?

A. That is my recollection, yes.

Q. Did you convey that offer to Mr. Hoffman?

A. Yes, I am sure that I did.

Q. Who initiated the plea negotiations, Mr. Wellman?

A. I initiated the discussions with the State.

Q. And the offer that you made to the State was to have Mr. Hoffman plead guilty to second degree murder, correct?

A. That is my recollection. And after reviewing some notes that you showed me last week, I am confident I did.

Q. And then there was a recommendation for a particular period of incarceration?

A. Yes.

[345] Q. The State rejected that offer, correct?

A. That is correct.

Q. And they offered to take the death penalty off the table if Mr. Hoffman pled guilty to first-degree murder?

A. That is my understanding of their position. I think Mr. Kane has a letter to that effect. It dawned on me just a moment ago that in post-conviction proceedings in a petition I may have attached his letter to my initial petition and to the amended petition.

Q. At the time of these negotiations, that would have been about five weeks prior to trial; is that your recollection?

A. It would have been in early February of '89.

Q. Was this prior or after – before or after Mr. Wages had pled guilty?

A. I am not sure if it was before or after Wages pled, but it was certainly before he was sentenced.

Q. Would it be fair to state that Mr. Hoffman rejected that agreement?

A. With my advice he did not accept it.

Q. Didn't you believe that the offer made by the State was in Mr. Hoffman's best interest at that time?

A. I don't, I don't really remember if I had articulated that previously or not. If I did, then that must have been what I said.

Q. Let's look at your deposition dated February 9, 1996, [346] page 70. And at that time Mr. Hoffman was represented by Mr. Peterson. And in the latter part of that question he says: "In your best opinion at the time, the deal would have been in his best interest as opposed to going to trial?" And you responded?

A. I said, "Yes."

Q. So if the deal was in the best interest of Mr. Hoffman at the time, why would you have recommended Mr. Hoffman not take the deal?

MS. FISHER: Your Honor, could I have a page number on that deposition page he just read.

MR. ANDERSON: Page 70, Your Honor. I think I stated that.

THE COURT: Counsel, these depositions all need to be published for the record. I wonder if we could

find some kind of a filing indicating what depositions are going to be made a part of the record? I will sign an order, just publish them rather than go through each of them individually. At some point they have to be published. However you want to do it. We have made reference to a lot of depositions without them being published.

MR. ANDERSON: And I think we can take care of that after today.

BY MR. ANDERSON:

Q. Do you recall the question, Mr. Wellman?

[347] A. No, I don't.

Q. If you believed that the plea agreement was in the best interest of Mr. Hoffman, why do you now claim that you recommended he not accept it?

A. Well, as I said earlier, I didn't think Max would – was really giving up a lot by going to trial because I didn't think there was a reasonable probability that one, Judge Weston would impose the death sentence, and two, that a death sentence would be upheld given my reading of Adamson and my knowledge that Adamson was reversed before Max went to sentencing.

Q. Are you certain on that, Mr. Wellman?

A. Well, I think it was. Can you tell me that it wasn't?

Q. You don't know if Ricketts was reversed? Do you know if Ricketts was reversed?

THE COURT: Counsel, this isn't – it either was or it was not.

THE WITNESS: My –

THE COURT: Go ahead.

THE WITNESS: The two reasons that I didn't think – well, in prior deposition I said it was in his interest to take the plea and he didn't take it. And my recollection of the reasons he didn't take it were, as I stated, one, he would not – I did not think that Judge Weston would impose a death sentence. Obviously a misplaced [348] opinion on my part.

Number two, I didn't think that a death sentence would be sustained because of the Arizona decision and the interpretation of the Arizona death penalty statute. Now, there may have been some other reasons that I articulated in previous statements, in previous depositions, but I don't want to try and recite those because I don't want to be incorrect. But if you brought them to my attention, I could tell you if I still had the same perception.

BY MR. ANDERSON:

Q. Would it be fair, Mr. Wellman, to state that Mr. Hoffman was going to reject that plea agreement because he was a con's con, irrespective of what your recommendation was?

A. Well, I don't think there is any question, Mr. Anderson, that Max, in my opinion, saw his best procedure to require the State to prove those matters against him. I think he had a sense of – you know, I would describe that he was of the old school. He was not, he was not going to snitch on anybody, he was not going to turn on anybody. And if the State charged him, then they needed to prove it.

Now, I can't tell you whether if in all of his previous criminal proceedings that he went to trial on each and every one of those. I don't know that he did. But –

[349] Q. But as far as this case?

A. I think the whole odd nature of these events, and I go back to the point in time when Denise disappeared and the Nampa police and the Canyon County prosecutor brought the indictments against Wages and Holmes and Max was dodging the charging, that he perceived himself as being out of the circle and was really a little bit surprised that he got drawn into the circle. And he needed to see the evidence that the State had in order to satisfy his mind or convince him that yeah, maybe there was a case here.

I don't know. All I can tell you is that Max was there, I think I explained to him the risk of not taking it and he said, "I am not going to take it. I will take my chances."

* * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MAXWELL HOFFMAN,	) **CASE NO.**
	) **CV-94-0200-S-BLW**
Petitioner-Appellant,	) **CAPITAL CASE**
	)
vs.	) **SECOND AMENDED**
	) **PETITION FOR WRIT**
A.J. ARAVE, Warden,	) **OF HABEAS CORPUS**
	)
Respondent-Appellee.	) (Filed Oct. 11, 2001)
	)

1. Petitioner, Maxwell Hoffman is confined in the Idaho State Maximum Security Institution under sentence of death.

2. Petitioner seeks relief from a judgment entered by the District Court for the Third Judicial District of Idaho, Owyhee County, Gerald L. Weston, Judge.

3. Petitioner seeks relief from a judgement of conviction and sentenced to death for first degree murder, and also received a sentence for an indeterminate period of confinement not to exceed 15 years, said sentence to run consecutive to the sentence for first degree murder, for the use of a deadly weapon in the commission of murder.

4. Petitioner was charged with one count of murder in the first degree, and one count for the use of a deadly weapon in the commission of murder.

5. Petitioner pled not guilty to both charges.

6. The charges against Petitioner arose from the death of Denise Williams, whose body was discovered on August 2, 1988. Ms. Williams had disappeared on or about September 18, 1987. Richard Holmes, Ronald Wages, and Petitioner were all initially charged with the murder of Ms. Williams, a drug informant employed by the Nampa Police Department. Wages pled guilty to first degree murder and was sentenced to a fixed life term of imprisonment by Judge Gerald L. Weston. Prior to Petitioner's trial, Holmes was murdered while an inmate in the Idaho State Correctional Institution in Boise.

7. Petitioner did not testify at his trial. He was tried by a jury, except as to those elements which made him eligible to receive the death sentence, which were tried to a judge alone.

8. Following his sentencing, Petitioner sought relief pursuant to the Idaho accelerated post-conviction relief statute. The trial court denied relief on December 12, 1989, after hearings on September 8, 1989 and December 8, 1989.

9. Petitioner appealed the judgment of conviction and the denial of post conviction relief to the Idaho Supreme Court. The Idaho Supreme Court affirmed the judgment of conviction and sentence and denied post-conviction relief on January 29, 1993.

10. Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court and such petition was denied. No petition for re-hearing was filed.

11. Petitioner filed a "Final Petition for Habeas Corpus" in the United States District Court of Idaho, No. CV-94-0200, from which a number of issues including allegations of ineffective assistance at trial, sentencing and postconviction/appeal were found to be procedurally defaulted. *Hoffman v. Arave,* 973 F. Supp.1152 (Dist Idaho 1997).

12. In February 1998, Hoffman filed a pro se motion to dismiss habeas counsel, drop further appeals, and vacate the stay of execution. A competency evaluation and hearing thereon was conducted after which the petition was dismissed without prejudice. Upon Petitioner's initiative, the district court reappointed counsel and set an evidentiary hearing for reconsideration of the Order of dismissal. The Court ordered a second competency examination. Following an evidentiary hearing the district court reinstated Hoffman's habeas proceedings, finding Hoffman was not competent to dismiss his proceedings.

13. Following briefing and argument on the merits, relief was denied on the remaining issues alleged in the "Final Petition" and the petition was dismissed. *Hoffman v. Arave,* 73 F. Supp 2d 1192 (D. Idaho 1998).

14. Upon appeal to the Ninth Circuit Court of Appeals, the Court found that Idaho's procedural default statute, Idaho Code Section 19-2719, as applied to Hoffman, "effectively prevented Hoffman from raising his ineffective assistance of counsel claims" and remanded to the district court for an evidentiary hearing on Petitioner's ineffective assistance of counsel claims. *Hoffman v. Arave,* 236 F. 3d 523 (9th Cir. 2001), *cert. pending.*

15. The Ninth Circuit further found that Petitioner's Fifth Amendment privilege applied during the presentence interview, but found it was "not violated in the circumstances of this particular case," because Petitioner was "advised that he could exercise his right to remain silent during the presentence interview." *Hoffman v. Arave,* 236 F. 3d at 538.

16. The Ninth Circuit Court of Appeals also found that Petitioner's Sixth Amendment right to counsel at the presentence investigation interview was violated. *Hoffman v. Arave,* 236 F. 3d at 540 and remanded on the question "whether the denial of counsel at the presentence hearing constituted 'harmless error' based in part, on relevant evidence that may be developed at the hearing to determine whether Hoffman was denied effective assistance of counsel." *Hoffman v. Arave*, 236 F.3d at 541.

17. Petitioner's counsel for trial, sentencing, post-conviction relief and on appeal were William Wellman, Nampa, Idaho and Charles Coulter, Boise, Idaho. Ms. Joan Fisher, Genessee, Idaho, was counsel for Petitioner on his

Petition for Writ of Certiorari to the United States Supreme Court. Court-appointed counsel on the original habeas corpus petition were Charles Peterson and Ellison Mathews of Boise, Idaho. On appeal of the denial of relief in the habeas proceedings, counsel were Joan M. Fisher of the Capital Habeas Unit, Federal Defenders of Eastern Washington and Idaho, Moscow, Idaho and Ellison Mathews of Boise, Idaho.

CLAIMS FOR RELIEF – FACTUAL SUMMARY

18. Hoffman's limited ability to perceive and understand the complex proceedings to which he has been subjected, the lack of fundamental fairness in the proceedings which led to the imposition of the death penalty, and the relative culpability of the actors underlie the issues here.

A. Denise Williams was a confidential informant working with Alan Creech of the Nampa Police Department[1] Richard Holmes was a known drug dealer and "a manipulating person." Ronald Wages was Holmes' bodyguard and enforcer. Sam Longstreet was Williams' sometime friend and lover and a customer of Holmes. Jim Slawson was Longstreet's friend and drug user.

B. Maxwell Hoffman was a 31-year-old would-be "auto mechanic" staying on the Holmes' property in a trailer with girlfriend, Dawn Williams. Hoffman's childhood was traumatized by the death of his father at twelve, and abandonment by his mother to a mental institution

[1] *State v. Hoffman*, 851 P.2d 934 (Idaho 1993).

shortly thereafter.[2] Hoffman remained in state custody until he was 16. Despite schooling,[3] he was unable to read.

C. After release, Hoffman was in and out of prison for burglary, possession of a firearm and drugs. He was heavily involved with drugs. When he went back to prison, despite significant effort, Hoffman could not read.

D. When Hoffman was paroled, he was conviction-free in California for six years. In 1987 he moved to Idaho and met Richard Holmes, and became heavily involved in drugs.

E. Knowing she was using drugs and not following instructions, Creech arranged a final narcotics transaction using Williams before releasing her. On September 10, 1987 Williams purchased drugs from Holmes. Actions by Williams and the police during the arrest revealed that Williams was working for the police.

F. Frightened that Holmes would believe that Longstreet set Holmes up with Williams, Longstreet and Slawson met with Holmes to advise him otherwise. Holmes inquired whether Longstreet and Slawson would kill Williams. They refused, but agreed to assist. Hoffman was not present at the meeting.

G. Holmes again met with Longstreet, Slawson and Wages. Hoffman was not present during any of the discussions with Longstreet and Slawson where they agreed to

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[2] The details of Hoffman's life as presented to Judge Weston is extremely sketchy because his attorneys did no sentencing preparation.

[3] The very limited schooling to which Max Hoffman was exposed was not developed by trial counsel and has only recently been discovered.

kidnap Williams for Holmes. Holmes, Longstreet, Slawson and Wages drove to a designated drop-off, detailing the kidnaping. Longstreet and Slawson agreed to kidnap Williams, call Holmes to keep him informed, and take Williams to the camp. Wages would meet them and tie Williams to a tree until Holmes arrived.

H. The next evening, Hoffman drove Holmes and Wages to the camp where Hoffman ingested and injected significant "quantities of methamphetamine" and cocaine. Leaving Wages behind, Holmes and Hoffman left the area. Longstreet and Slawson arrived some time later with Williams. Longstreet testified that he called Holmes and informed him they had Williams, though Hoffman later testified at sentencing that he was unaware of the call if it was made. Holmes asked Hoffman to pick up Wages.[4]

I. Longstreet and Slawson delivered Williams to Wages knowing her fate. Wages had Williams stripped and tied by Longstreet and Slawson who left thereafter.

J. When Hoffman arrived at the camp, he was surprised and angry to see Williams because he wanted nothing to do with whatever was going on. Because of "his strong bonds of loyalty to friends and those who are part of his group," and presumably inspired by a code of conduct developed through institutionalization, Hoffman believed he had to assist Holmes and Wages in the events that followed. Holmes gave Hoffman drugs. Williams was assaulted by Holmes. Later, while quite high, Hoffman cut

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[4] The "facts" are as presented at trial and sentencing and generally accepted by Judge Weston. It should be noted that many of the "facts" then presented by Wages are now denied by him and Mr. Hoffman's mental state makes any version of events given by him questionable.

Williams' throat leaving a non-lethal wound. At sentencing Max Hoffman testified that he believed the cut to the throat would cause Williams to stay out of sight until Hoffman and Wages left and thus, save her life. Williams, however, followed Hoffman out of the cave in which he had left and was observed by Wages, who grabbed the knife from Max and stabbed Williams in the chest which Wages believed killed her. Believing her to be dead, both Wages and Hoffman purportedly threw rocks on top of her. Wages then hit her with a large rock. The cause of death was a crushing blow to the head by a rock, most likely hurled by Wages. It was this event which convinced Max Hoffman that Ron Wages and not Max was guilty of murder.

K. During the investigation into Williams' disappearance, Longstreet and Slawson informed against Holmes and Wages in exchange for six months in jail on the kidnaping. Holmes and Wages were indicted for conspiracy to commit murder. Hoffman was convicted and held at the penitentiary on charges filed by other "confidential informants" of Alan Creech, namely, Renee Lindquist and Ricky Simonis. Hoffman was represented on these charges by Van Bishop, also attorney for Slawson and Longstreet.

L. Seeking to save himself, Holmes led the police to Williams' body and gave statements incriminating Wages and Hoffman for an agreement for five years. Giving his version of events in which he blamed Wages and Hoffman for the killing, Holmes failed two polygraph examinations and would not have benefitted from the agreement made.

M. Knowing the body had been found, Wages confessed to the killing and became a witness for the State, giving them his account of the series of events that resulted in the

murder with unmistakable inferences by the authorities that the state would not seek the death penalty.

N. Wages and Hoffman were charged with first degree murder in Owyhee County. Wages was the principal witness against Hoffman at his preliminary hearing and trial. Hoffman tried to call Holmes as a witness, but Holmes invoked his Fifth Amendment right against self-incrimination through the efforts of the Canyon County prosecutor, Richard Harris, and refused to testify. Holmes was killed in prison before Hoffman's trial.

O. Rejecting an offer of life upon his court-appointed counsels' advice and misunderstanding of the law, Hoffman went to trial and was found guilty of first degree murder. Counsel's request to be present at the presentence interview was denied. Counsels' request for appointment of a psychiatrist was "granted" by an order of appointment of a psychologist charged with answering specific statutory questions.

P. Despite repeated requests to have counsel present at the presentence interview, Hoffman was subjected to an intensive interrogation by DOC Probation and Parole Officer, Betty L. Davis and Bill Auty during which Ms. Davis failed to honor Hoffman's requests for counsel and his assertions that he could not discuss certain matters without his attorney present. Included in information given by Hoffman was his sense of responsibility for two deaths (Williams and Holmes) as well as having knowledge of two other homicides, which he could have stopped "by putting his life on the line."

Q. At sentencing, defense counsel called only two witnesses – Charles Fisher, Williams' father and Max Hoffman. Counsel did not believe Judge Weston would

sentence Hoffman to death because of the equal culpability of Wages and thus, permitted Hoffman to testify at sentencing.

R. Defense counsel did not call any family members or the psychologist who found probable brain damage. No psychological, prison, medical, school or institutional records or any other documentation regarding Hoffman's life, mental state, childhood or learning difficulties were presented. Though a request for an appointed psychiatrist was made, no psychiatric or physical evaluations were conducted.

S. Max Hoffman's decision to testify at sentencing was made in part based upon his counsels' advice, his incriminating statements made to the presentence investigator over his request for counsel and assertion of his right to silence regarding facts of the offense, his inability to understand the law of parties or the acts as related in his testimony were sufficient to support a finding of guilt for first degree murder.

T. The father of Denise Williams testified that the family did not believe it would be just to sentence Hoffman to death when the three other persons equally involved did not receive death and Hoffman's death would not compensate for that of Denise.

U. In sentencing Hoffman to death, the judge relied on two statutory aggravating factors: the victim was a witness; and the killing was committed in a particularly cruel, atrocious and heinous manner, exhibiting exceptional depravity. Defense counsel did not challenge at sentencing or on appeal either of the statutory aggravating factors found. In mitigation the court found among other things that Hoffman was a person of normal intelligence but

educationally deficient; was an auto mechanic and capable of being a productive member of society; was capable of warm feelings for others; did not have a normal childhood and "that he has spent most of his life as a child and later as an adult in criminal institutions."

V. Hoffman was sentenced to death, after which Wages was sentenced to life with a recommendation of the same made by the State.

GROUNDS FOR ISSUANCE OF THE WRIT

19. The grounds for issuance of the writ are as follows:

A. *"HEINOUS, ATROCIOUS AND CRUEL" IS AN UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCE AND THE EVIDENCE AT TRIAL DID NOT ESTABLISH A BASIS FOR THE COURT'S FINDING.*

Petitioner's sentence of death resulted from the trial judge's reliance on the unconstitutionally vague aggravating circumstance; namely, that the murder of which Petitioner was convicted was exceptionally "heinous, atrocious and cruel, manifesting exceptional depravity." Moreover, the evidence offered at trial to establish the aggravating circumstance was insufficient. The trial judge's reliance on this factor violated Petitioner's right to due process under the Eighth and Fourteenth Amendments to the United States Constitution.

Facts Supporting Petitioner's Claim

After the sentencing hearing, the trial judge issued its [sic] findings that two aggravating circumstances had been

proven. These circumstances were Idaho Code Section 19-2515(g)(5); that the murder was heinous atrocious and cruel, and (g)(10); that a witness was murdered. The trial judge did not state at the sentencing that it [sic] had found either circumstance to have been proved "beyond a reasonable doubt." That finding was made in the written findings filed on June 13, 1989.

The trial judge found the following facts to support his aggravating circumstance:

> (1) "Denise Williams was taken out to Owyhee County in the evening; she was stripped naked, tied up, and verbally and physically abused . . . "

Hoffman does not dispute these facts, but he had no involvement in any of these acts, and the evidence did not establish beyond a reasonable doubt that he knew of any plan to kidnap or kill Denise Williams in advance of his involvement after these incidents had occurred. Longstreet and Slawson, at Holmes' direction, took Denise into Owyhee County. They stripped her naked and tied her up at Wages' direction. Max did not verbally abuse Denise, and his physical involvement with her came when he cut Denise with his knife.

> (2) "There is no question that she knew then she was going to be killed. While the Defendant was not present at that time, he was present later that evening on the ION Highway when the defendant [sic] was kicked in the head by Holmes and further verbally abused and told that she was 'dead meat . . . '"

Whether Denise knew she was going to be killed is subject to considerable speculation. Clearly the judge is correct that Hoffman was not there when the acts of cruelty relied upon and described in the preceding section, occurred. Max denied he was present when Holmes kicked Denise. He testified that he did not try to stop Holmes because he was in fear for his own life.

> (3) "The defendant and Ronald Wages then drove around Owyhee county [sic] with her the rest of the night and until first light the next morning. The Defendant then took the victim from the car, banged her head against the car door and took her with him down into a ravine where the defendant then slashed her throat. Her death was slow and agonizing . . . "

The aggravating factors here were the subject of dispute and not proven beyond a reasonable doubt. Hoffman admitted that he cut Denise across the throat, but denied he did so intending to kill her. Moreover, every killing by knife cannot rise to the level of "heinous, atrocious and cruel" such as to qualify for the death penalty. There was no evidence that Max "banged her head against the car door." The court's conclusion that the death was slow and agonizing is not supported by any evidence.

> (4) "She spent the entire night knowing that she was going to die and then had to beg Wages to finish the job . . . "

Assuming for a moment that Denise believed she was going to die that evening, the cross-examination of Max at the sentencing hearing established that even the prosecutor did not believe or contend that Denise *begged* for Wages to finish the job:

Question (by Mr. Kane) – "Ron Wages was truthful that he came down and got the knife from you or you tossed it to him and he finished her off?

Answer – That's true.

Question – And that she actually said, 'Did you come to finish the job?'

Answer – Yes.

Question – To Ron Wages?

Answer – Yes.

Question – He didn't lie about that?

Answer – No, he didn't. (RT at 2126)

From this exchange it is apparent that the conclusion of the court that Denise had to beg Wages to "finish the job" is in error. Max's testimony shows that Denise did not beg Wages to finish the job. On the contrary, the above exchange indicates there was a question of whether Wages was there to finish what Max could not. This fact is not aggravating as to Max, but rather is aggravating as to Wages.

(5) "There is no proof from which the Court could determine whether the victim was bleeding to death because Hoffman lost his nerve or whether he was trying to please Richard Holmes by letting her 'bleed to death like an animal.' During the trial witnesses had testified that Richard Holmes had made the statement that he would make Denise Williams 'bleed to death like an animal.' Whatever the cause of her slow death the killing was highly atrocious, cruel and proves unusual depravity on the part of

> the defendant, Maxwell Hoffman." (Findings of the Court, Clerks Record at 1450).

It is clear that the court did not find this "fact" to exist beyond a reasonable doubt, and it therefore is not an aggravating circumstance. The testimony of Longstreet, Slawson and Wages established that Max was not in the room when this statement was made. To the extent that it forms a basis for the death penalty, the court is in error.

The problems associated with the ground "heinous, atrocious and cruel" are clearly displayed in this case. The finding was loosely made in reliance on factors which were not proven beyond a reasonable doubt. The statute is so vague, a trial court can fashion the conclusion from any set of facts. In this case the facts needed for such a conclusion were not proven.

B. *THE FAILURE TO AUTHORIZE FUNDS FOR A PSYCHIATRIST AT THE POST-CONVICTION RELIEF STAGE DENIED PETITIONER HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.*

Hoffman's sentence of death was obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the sentencing judge during the post-conviction relief state of the proceedings refused to authorize funds for the appointment of a psychiatrist to examine Max, despite a May 10, 1989 psychological evaluation report by David Sanford, Ph.D., in which he opined that Petitioner suffered from neurological damage to the left hemisphere, most likely secondary to a closed head injury and protracted substance abuse history.

Facts Supporting Petitioner's Claim

Dr. David Sanford was hired to evaluate Max prior to the sentencing hearing in this case. His evaluation report clearly evidenced the likelihood that Max suffers from serious psychological and emotional illness. By way of example, Dr. Sanford reports that he found Max so vague and confused that he "could not really discern if [Max] had ever really been to junior high or high school."

Evidence of Max's likely neurological damage is found in the report in a number of places. Dr. Sanford stated that he found Max's speech like "someone who has a history of boxing." Dr. Sanford was reminded of Sylvestor Stallone's portrayal of Rocky in the series of movies of the same name. Following the first visit with Max, he felt Max may have some "brain damage or neurological problem," and therefore he inquired further, using a series of neuro-psychological tests. Max was very specific with Dr. Sanford during those tests that he had been beaten with a cue stick and a chain, and had a history of sniffing gasoline and glue.

Dr. Sanford determined Max has an I.Q. of 72. Max has a vocabulary of three and four letter words. His reading grade level was 2.6, or approximately midway through the second grade. His math ability was roughly third grade level. These levels were so low as to preclude the use of the Minnesota Multiphasic Personality Inventory (MMPI), by far the most common test of personality used.

Max also exhibited an inability to remember things presented verbally. This corroborated some "type of injury or trauma to the left hemisphere." On the Rorschach inkblots, Max could only produce two scorable responses.

His responses to those two indicated to Dr. Sanford "a pathological repression and denial of feelings combined with a gross inability to deal or cope with his own internal impulses."

Dr. Sanford expressed his diagnoses as follows:

Axis I: 305.90, psychoactive substance abuse NOS.

Axis II: V40.00: borderline intellectual functioning.

315.31: developmental expressive language disorder

301.70: Antisocial personality disorder.

Axis III: Neurological damage to left hemisphere, most likely secondary to closed head injury and protracted substance abuse history.

Axis IV: Severity of psychosocial stressor scale: 5-extreme.

Axis V: This is a global assessment of functioning scale with a high score of 90 indicating absence of minimal symptoms and a score of 1-10 suggesting persistent danger or severely harming himself or others or consistent inability to maintain personal hygiene: 10, recurring violence.

In his analysis of the degree of the Petitioner's illness, Dr. Sanford concluded Max was "quite impaired." Max lacked insight into the nature and severity of his personal problems and had limited intellectual resources.

As a condition to considering the post-sentencing defense motion for an independent psychiatrist, the trial court required disclosure of Dr. Sanford's report. Upon review of the report, the motion was denied by the court's order dated December 14, 1989.

By its refusal to grant the defense additional assistance to investigate the psychological, neurological and psychiatric illness of the Petitioner, the sentencing judge denied Petitioner the exercise of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

C. *PETITIONER WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL BY THE COURT'S ORDER PROHIBITING HIS LAWYER FROM BEING PRESENT FOR THE PRESENTENCE INVESTIGATION INTERVIEW.*

Hoffman was denied his right to counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by the court's order denying Petitioner's motion that his attorney be present for the presentence investigation interview.

Facts Supporting Petitioner's Claim

Following the guilt phase, the trial court ordered that a presentence investigation interview be conducted with Petitioner. Defense counsel requested the opportunity to be present, but was told by the presentence investigator that he could not. Petitioner then filed a motion to insure that he would be present during the interview with Petitioner. On May 2, 1989, the trial court denied that motion and ruled that counsel had no right to be present for the

interview. The effect of this particular ruling was to deny Hoffman his rights to due process and to the effective assistance of counsel.

Petitioner needed the presence of counsel to fully develop mitigation evidence for use by the trial court at sentencing. This was due in part to Petitioner's low I.Q., illiteracy, and fear that he might say something incorrectly without his attorney present. The state knew the evidence on which it would rely for aggravation, but the presentence interview would have provided Petitioner with his first, and perhaps most important opportunity to lay ground work to avoid the death penalty. This was a critical stage of the proceedings, and one during which he should have had benefit of counsel.

D. *PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF THE TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.*

Hoffman was deprived of his right to the effective assistance of counsel, at the guilt phase of trial, as guaranteed him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as applied in *Strickland v. Washington,* 446 U.S. 668, 686 (1984), and *United States v. Cronic,* 466 U.S. 648 (1984), due to failures of defense counsel including, but not limited to the following.

(1) Defense counsel failed to request independent psychiatric, psychological, neurologic and neuropsychological experts to determine Petitioner's mental condition and whether any mental defenses were available despite defense counsel's recognition that Defendant had

mental problems. Had defense counsel secured independent psychiatric, psychological, neurologic and neuropsychological experts, counsel could have raised, developed and argued the following defenses to defeat or prevent a finding of guilt to first degree murder:

a. Because of Max Hoffman's brain-damage, mental illness and mental retardation, his participation in the offense, if any there was, was without specific intent to commit murder or malice aforethought as required to convict of first degree murder;

b. Because of Max Hoffman's use of drugs provided by Richard Holmes Petitioner's state of intoxication was so great as to preclude the finding of intent required for first degree murder;

c. Because of Petitioner's congenital brain damage, possible secondary brain damage, mental illness, and intellectual deficiencies including significant dyslexia and mental retardation, any intent formed by Petitioner would not render Petitioner guilty of first degree murder and would at a minimum have reduced the degree of murder of which Petitioner would have been convicted.;

d. To the extent Petitioner participated in the kidnaping and assault on Denise Williams, he did so only as a result of his fear and will which was overborne by duress and coercion by Richard Holmes and Ronald Wages;

e. Because of Petitioner's mental disease and defect he lacked the capacity to assist in his own defense under Idaho Code § 18-210 and thus, was not competent to proceed to trial.

(2) Defense counsel failed to investigate Petitioner's mental condition and its origins despite the availability of

evidence which would have established that Petitioner suffered from congenital brain damage as well as had a long-standing history of substance abuse, and showed evidence of neurological damage, perhaps secondary to a closed head injury and protracted substance abuse.

(3) Defense counsel failed to take reasonable steps to accommodate Petitioner's illiteracy to allow him to effectively participate in the trial. Counsel failed to investigate the nature and extent of this particular problem, failed to request the assistance of the court in providing Petitioner with a person to read reports and assist defense counsel in communicating with Petitioner, and failed to advise the court fully of Hoffman' s illiteracy prior to trial such that the court might fashion a remedy.

Had defense counsel investigated the nature of Petitioner's "illiteracy," they would have discovered that Petitioner was brain-damaged, dyslexic and mentally retarded all of which prevented him from reading any reports or from engaging in any competent decision-making or even comprehending the legal complexities necessary for him to understand the charges against him and assist his attorneys in the development or presentation of a defense.

(4) On February 6, 1989, Deputy Attorney General Michael Kane (acting prosecuting attorney for Owyhee County) tendered a plea bargain offer to trial defense counsel William H. Wellman. That plea bargain offer provided that if Petitioner would plead guilty to Count I of the Information, Murder in the First Degree, that the State would not seek the death penalty and would recommend a lesser sentence. That plea bargain offer also carried with it the promise from Michael Kane that if the

plea bargain offer was not accepted and Petitioner was convicted at his jury trial, that Michael Kane would seek the death penalty.

Defense counsel did not understand the law with regard to whether or not Petitioner would likely face the death penalty, and advised Petitioner that he would not face the death penalty, or be executed even if convicted of Murder in the First Degree. Defense counsel William H. Wellman specifically advised Petitioner (and others) that as a result of the Arizona case of *Adamson v. Ricketts,* Petitioner would not be executed due to the similar statutory language of Arizona and Idaho. This advice remained uncharged and unaltered through trial and conviction. As a result and in reliance on counsels' advice and assurances, Petitioner rejected a plea bargain which would have foreclosed the State from seeking the death penalty. Petitioner therefore proceeded to trial due to the advice of trial counsel that he would not he executed regardless of the outcome. Had Petitioner been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood Petitioner's mental state including his brain damage, dyslexia, mental illness including psychosis, and mental retardation, counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

(5) Defense counsel did not – because he could not as a result of Petitioner's mental conditions – fully explain to Petitioner his available defenses or lack of defenses, and thereby deprived the Petitioner of his right to be made competent and then to be fully informed while making the determination as to whether or not he should accept a plea

bargain which had been proposed by the prosecutor, and which would not have subjected the Defendant to the death penalty.

(6) Counsel's lack of experience and training without seeking outside assistance and appropriately bringing themselves up to the necessary level of knowledge regarding the substantive and procedural complexities involved in capital case litigation, rendered the performance of counsel below the prevailing professional norms and resulted in the conviction and death sentence of Petitioner.

(7) Counsel's failure to research relevant law regarding mental health issues including the defense's absolute right to independent psychiatric and psychological expert assistance in the development and defense of the first degree murder charge and potential sentence of death resulted in counsel's failure to identify critical psychiatric and psychological issues which would have led counsel to understand their client's psychiatric and mental conditions and their affect [sic] on the pending proceedings;

(8) The failure to request an investigator in a case which involved hundreds of audio-cassettes and innumerable offense reports, confidential informants and was extra-ordinarily complex because he "did not want to burden taxpayers" resulted in a failure to develop potential defenses including the fact that law enforcement and/or the co-defendants relegated the greatest portion of blame and responsibility on Petitioner who was the most vulnerable and least able to defend himself;

(9) Counsel's failure to challenge Idaho's abolition of the defense of insanity in a case in which the Petitioner's mental state raised the issue and at a time when the

statute was not well settled and which does indeed violate the due process clause of the United States Constitution.

(10) Counsel failed to secure, prepare and present a competent expert in the effect of the drugs and resulting intoxication and/or drug-induced psychosis at the time of the offense or to develop the factual basis regarding nature, extent and effect of long-term and immediate use of cocaine and amphetamines on Hoffman and/or Wages. The full development of the issues arising in this case concerning substance abuse, at the time of the offense and long-term use and abuse deprived the jury of a clear picture of the events that transpired and of Hoffman's mental state at the time of the offense.

(11) Counsel failed to review all of the evidence including over 130 audio tapes and interview all of the critical witnesses including Renee Lindquist and Ricky Simonis to enable counsel to coordinate a trial strategy with co-counsel and failed to formulate and co-ordinate a reasonable trial strategy which resulted in the failure to present a cogent and consistent defense.

(12) Counsel failed to develop Ron Wages' roles in the current offense by investigating, developing and presenting evidence of Wages' prior acts of violence including his involvement in the assault on Renee Lindquist, his experience and reaction to extensive drug use and abuse including likely psychotic reaction to injection of cocaine and methamphetamine before and during the offense and the likelihood that Wages came from California as an actor in a larger drug ring than that of Richard Holmes, making Wages the person Judge Weston believed Max Hoffman to be.

(13) Trial counsel failed to adequately research, develop and litigate Petitioner's motion to suppress statements made by Hoffman pursuant to solicitation and questioning by law enforcement during custodial transport of Petitioner to and from his jury trial.

(14) Counsel failed to request and secure a complete physical examination pretrial. Had counsel secured a physical examination, it likely would have been discovered that Petitioner suffered from "metabolic derangements which included diabetes and hypoglycemia, a metabolic disease affecting the brain and reducing the ability to make voluntary judgments."

(15) Counsel permitted a brain-damaged, dyslexic, psychotic, mentally retarded client to dictate strategy, investigation and presentation of the case, despite knowing that the client could not understand legal concepts and apply them to his situation.

These failures fell below the standard of prevailing professional norms of practice by a reasonably competent criminal defense attorney and but for these failures, individually and cumulatively, the proceedings would probably have had a different outcome resulting in a finding of not guilty of first degree murder. By virtue of the cumulative ineffectiveness of counsel at trial and the pervasive effect of counsel's failure to develop the mental health issues, Petitioner suffered from actual deprivation of counsel. As a result of the ineffectiveness of counsel Petitioner was denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution under *Stickland v. Washington, supra* and *United States v. Cronic,* supra.

E. *PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF THE TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.*

Hoffman did not receive effective assistance of counsel at sentencing in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because of the failures of his counsel, including, but not limited to the following:

(1) Defense counsel failed to request the appointment of independent experts in psychiatry, psychology, neurology and neuropsychology despite clear and readily available evidence that such appointments were necessary in order to adequately represent Petitioner and to adequately present mitigating circumstances. Even more compelling evidence of both counsel and the courts' failure to insure Hoffman a fair trial, including a fair sentencing proceeding, and the effective assistance of counsel, is the fact that Hoffman's illiteracy – now known to be the result of congenital and possibly secondary brain damage, dyslexia, and mental retardation – is reported in the prior presentence investigation report dated 6/7/88, relating to the kidnapping charge which the court used as an aggravating factor in the present case. The trial court had a copy of the 6/7/88 presentence investigation report *prior* to sentencing Max on the murder conviction, as it was attached to the presentence report in this case and cited to for Judge Weston's review. Defense counsel failed to investigate, develop, raise, present and argue the inability to read or write and the causes thereof at the time of sentencing.

Had counsel adequately developed and presented the issues the sentencing judge would not have erroneously found that Petitioner was of "average intelligence but educationally deficient."

(2) Defense counsel failed to adequately consult with Dr. Sanford and failed to make available information necessary for Dr. Sanford to competently evaluate Petitioner. Had counsel adequately consulted with Dr. Sanford, they would have tested Petitioner further and provided sufficient information to Dr. Sanford to undermine his diagnoses of Antisocial personality and lack of available treatment.

(3) Defense counsel failed to fully investigate Petitioner's prior criminal record and his prior history so as to be able to present mitigating circumstances to rebut evidence and aggravation. Had counsel adequately investigated Petitioner's background, they would have been in a position to advise the court that, among other things, Petitioner's institutionalization as a child was the result of abandonment by his mother and not incarceration for criminal activity.

(4) Defense counsel failed to present psychological or psychiatric testimony, despite the fact that he had obtained the report of Dave Sanford, Ph.D., which indicated the Petitioner had a lengthy history of drug abuse, evidence of injury or trauma to the left hemisphere of the brain, neurological damage to the left hemisphere of the brain, most likely secondary to a closed head injury and a long-standing substance abuse history.

(5) Defense counsel failed to raise all mitigating circumstances available to the defendant, including but not limited to Petitioner's congenital brain damage, his

father's severe and debilitating alcoholism which ultimately led to significant physical and psychological abuse, his efforts to learn despite his inability to do so, his relationship with the parents of the director of New Horizon's Juvenile Home, a place where Petitioner was farmed by the state of Illinois during the period of time that the State of Illinois maintained custody of Mr. Hoffman, the effects of the foster care system and early mental institutional custody, the efforts of Del Barnett's mother to teach Mr. Hoffman to read, the lack of consistent parenting by either his mother or father, his mother's abandonment of Max at age 12 to marry an abusive spouse, the institutional failures of the State of Illinois to provide Max Hoffman with the necessary educational, psychological and psychiatric care and treatment.

(6) Defense counsel failed to understand Hoffman's mental conditions and deficiencies and permitted him to testify at the sentencing proceeding, knowing that Max Hoffman did not understand the legal complexities involved in the law of parties, was unable to waive his Fifth Amendment rights and his inability to understand that the admissions he was going to make were sufficient to conclude that he was guilty of first degree murder.

(7) Counsel's lack of experience and training and their failure to sufficiently consult with experienced counsel and research underlying capital jurisprudence led counsel to believe that Hoffman would not be sentenced to death and thus, resulted in a total failure to act in compliance with the prevailing standards of professional norms in the litigation of capital sentencing.

(8) Counsel's failure to research the relevant capital law including the Idaho Supreme Court's recent decision

in *State v. Leavitt,* 775 P.2d 599, 608 (Idaho, 1989) in which the state supreme court held that a judge could not sentence a person to death because there was no treatment available without first considering the alternative of fixed life; had counsel been familiar with the Leavitt case, they would not have been afraid to present the significant mitigating information found in Sanford's psychological report simply because Dr. Sanford found [mistakenly] that Max Hoffman was not readily amenable to treatment.

(9) Counsel's failure to be familiar with the Idaho statutes requiring alternative sentencing in Idaho for insane and mentally ill which permits the placement of the mentally ill in the appropriate facility and requires treatment of his mental illness as well as their failure to discover and develop Petitioner's mental illness was below the prevailing professional norms of competent counsel. But for counsel's lack of familiarity with the legal and factual basis which rendered Mr. Hoffman amenable to placement in an appropriate facility and treatment for his mental illness, Mr. Hoffman would not have been sentenced to death and he would not have been compelled to endure over 12 years in solitary confinement without treatment for his mental illness rendering him wholly incapable of coping with the DOC policies developed for the custodial conditions of the sane.

(10) Counsel's failure to adequately research sentencing in capital cases including *Lockett v. Ohio,* 438 U.S. 536 (1978) and *Eddings v. Oklahoma,* 455 U.S. 104 (1982), resulted in a total breakdown in counsel's responsibilities at sentencing in a capital case. Had counsel been familiar with their responsibilities at sentencing, they would not have limited sentencing to two witnesses, one of whom was a brain-damaged, psychotic, dyslexic, mentally retarded client

who did not understand the legal implications of his testimony.

(11) Counsel failed to request a mitigation specialist without whom they were unable to understand and appreciate the importance of life history at sentencing and for mental health evaluations.

(12) Counsel failed to gather any records including genealogical, medical, school, institutional, psychological, psychiatric, prison or employment, all of which were necessary for any sufficient mental or physical examination required prior to sentencing. Had counsel gathered records in 1989, records now destroyed which could have explained Mr. Hoffman's mental and physical health at the time of his placement in juvenile facilities while in the state custody as well as having produced numerous records which would have evoked complete psychiatric and neurological examinations which would have revealed that Petitioner was brain-damaged, psychotic, possibly hypoglycemic, and mentally retarded, all of which would have been mitigating and would have resulted in a sentence less than death.

(13) Counsel failed to find, interview and present at sentencing family members and caretakers all of whom could have presented a picture of Max Hoffman dramatically different than that known to the sentencing judge. Had counsel interviewed relevant witnesses in mitigation, Judge Weston would have heard from the mother, sisters, aunt, uncle, brother-in-law all of whom would have testified to a life of deprivation, physical and psychological abuse by an alcoholic father and incompetent mother. Petitioner's mother nevertheless would have testified of her love for her son and have begged the judge to spare

her son's life. Had counsel adequately found, interviewed and presented relevant caretakers, the sentencing judge would have heard of a loving relationship which existed between petitioner and the parents of the director of New Horizons, giving to Mr. Hoffman the only known familial affection he ever experienced, the mother of Del Barnett would have testified that she was a special education teacher and that Max Hoffman was the "only boy she couldn't teach to read." Interviews of persons with whom Petitioner was employed would have revealed that despite his desire to be so, Max Hoffman was not capable of performing the tasks required of an auto mechanic and in fact, engaged in sporadic employment of a janitorial nature and was only able to minimally assist the auto mechanics. Counsel would have found witnesses including Ron Wages, Mike Holmes, Debra Holmes, Dawn Williams, and Petitioner himself and mental health experts all of whom would have made clear to the sentencing court that Max Hoffman was not a leader, was prone to follow and remain loyal and act in conformance with the requests of Richard Holmes out of fear or as a result of his mental deficiencies including his mental illness, drug addiction, mental retardation, brain-damage, dyslexia and emotional and physical dependence arguably rendering Petitioner far less culpable in his acts in the offense than either Ron Wages or Richard Holmes or co-defendants Slawson and Longstreet.

(14) Counsel failed to research and to know that the diagnosis of Antisocial Personality when brain-damaged was inaccurate, or in the alternative, to understand the diagnosis of Antisocial Personality sufficiently to negate the potential aggravating affect [sic] of the same;

(15) Counsel failed to present a cogent sentencing argument based on statutory provisions for sentencing the mentally ill and capital jurisprudence regarding mitigation. Counsel further fell below prevailing professional norms by permitting the State to argue without objection matters not supported by the evidence including that Petitioner was a sociopath and that it was clear that Max was capable of conforming his conduct to the law, especially since the accuracy of both arguments were undermined by Dr. Sanford's report and thus, known to counsel.

(16) Counsel's decision to put a brain-damaged, psychotic, dyslexic, mentally retarded client on the stand at sentencing to make admissions not otherwise made except during the uncounselled PSI interrogation when the client was not sufficiently competent to knowingly, intelligently or voluntarily waive his right not to incriminate himself as guaranteed by the Fifth Amendment to the United States Constitution was below the prevailing professional norms and prejudiced Petitioner by his admission to the offense in question as well as other illegal activities without which Petitioner would probably not have been sentenced to death.

(17) Counsel failed to object at sentencing to any information contained in the Presentence Investigation Report including that which was garnered as a result of the continued interrogation of Petitioner despite his assertions to the right to silence and to counsel and his inability to comprehend and knowingly, intelligently and voluntarily waive the same.

(18) Counsel failed to challenge aggravating factors of heinous atrocious and cruel and that Denise Williams was killed because she was a witness in a criminal or civil

proceeding where both factors were subject to contest, including that Denise Williams was killed because she was an informant, not because she was a witness in a proceeding. Had Petitioner's counsel contested the findings by the court, Petitioner's right to a jury trial on the aggravating factors would have been preserved and the sentence of death would not have been imposed.

(19) Counsel failed to request and secure a complete physical examination which ought to have been included in the Pre-sentencing Report regarding the health of the defendant as required under Idaho Criminal Rule 32(b)(8). Had counsel secured a physical examination, it likely would have been discovered that Petitioner suffered from "metabolic derangements which included diabetes and hypoglycemia, a metabolic disease affecting the brain and reducing the ability to make voluntary judgments."

These failures fell below the standard of practice by a reasonably competent criminal defense attorney and but for these failures, individually and cumulatively, Petitioner would not have been sentenced to death but, if sentenced at all, would have been sentenced under Idaho Code Sections 18-207 and 19-2523 providing that Petitioner be placed at an appropriate facility for treatment and court authorization for treatment of his mental illness. By virtue of the cumulative ineffectiveness of counsel at sentencing and the pervasive effect of counsel's failure to develop the mental health issues, Petitioner suffered from actual deprivation of counsel. As a result of the ineffectiveness of counsel Petitioner was denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

F. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INCLUDING THE SPECIAL PRE-APPEAL CAPITAL POST-CONVICTION PROCEEDINGS IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Petitioner did not receive effective assistance of counsel on appeal, including during the statutory special pre-appeal capital post-conviction proceedings, in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because of the failures of his counsel.

The acts and omissions of Petitioner's counsel which fell below the prevailing professional norms include but are not limited to the following:

(1) Petitioner's appellate and post-conviction relief attorneys were the same as his trial attorneys and thus had a conflict of interest which prevented them from recognizing their ineffective performance at trial, and sentencing.

(2) Petitioner's appellate attorneys failed to withdraw from representation as a result of a potential conflict, and failed to seek appointment of independent counsel to consider whether or not their representation at trial had constituted ineffective assistance of counsel.

(3) Petitioner's appellate and post-conviction relief attorneys failed to raise the question of their failure to adequately advise Petitioner on the law relating to the possibility or probability of his execution if the plea bargain offer of the State was rejected. To the contrary,

Petitioner was advised he would not be sentenced to death even if he did proceed to trial.

(4) Petitioner's counsel failed to adequately research, present and argue critical issues on appeal including but not limited to:

a. Idaho's abolition of the insanity defense violates the due process clause of the Fourteenth Amendment of the United States Constitution;

b. Imposition of the death penalty on a person who is mentally retarded is a violation of the prohibition of cruel and unusual punishment and due process clauses of the Eighth and Fourteenth Amendments to the Constitution of the United States;

c. That the continued interrogation by Betty L. Davis of the DOC after Petitioner exercised his right to remain silent in the PSI interview violated Petitioner's Fifth Amendment right not to be compelled to incriminate himself;

d. The failure of the sentencing judge to sentence Petitioner under Idaho's alternative sentencing for the mentally ill;

e. The evidence was insufficient to support a finding beyond a reasonable doubt that Petitioner murdered Denise Williams because she was a witness in a proceeding;

f. The trial court's finding that Petitioner "spent most of his life as a child . . . in criminal institutions" was not supported by the record and the court's reliance on Petitioner's custody in the state of Illinois as a result of his mother's abandonment of him violated the principles of

Beam v. Paskett, 3 F. 3d 1301, 1308 (9th Cir 1993), *cert. denied, Arave v. Beam,* 511 U.S. 1060 (1994), *overruled on other grounds, Lambright v. Stewart,* 191 F.3d 1181 (9th Cir 1999), by considering in aggravation, constitutionally protected behavior;

g. The trial court's finding that Denise Williams would have bled to death because "her carotid artery had been cut and she had been stabbed in the heart" was not supported by the evidence;

h. Trial court's denial of Petitioner's motion to suppress statements made by Hoffman pursuant to solicitation and questioning by law enforcement during custodial transport of Petitioner to and from his jury trial.

These failures fell below the standard of practice by a reasonably competent criminal defense attorney and but for these failures, individually and cumulatively, the proceedings would probably have had a different outcome, namely, Petitioner's sentence of death would have been reversed on appeal and Petitioner ultimately sentenced to something less than death and placed in an appropriate medical facility with provision for treatment of his mental illness.

G. *THE SENTENCE OF DEATH IMPOSED ON PETITIONER WITHOUT PROOF THAT HE KILLED, ATTEMPTED TO KILL, INTENDED TO KILL, OR ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.*

Hoffman was sentenced to death without proof that he killed or intended to kill Denise Williams, in violation of

his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Facts Supporting Petitioner's Claim

An explicit finding of fact beyond a reasonable doubt that Hoffman (1) killed, attempted to kill, or intended to kill Denise Williams, or (2) was a major participant in the commission of the crime, and acted with reckless indifference to human life, was a constitutional prerequisite to the imposition of the death penalty. *Tison v. Arizona,* 107 S.Ct. 1676 (1987); *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368 (1982); *State v. Gibson,* 106 Idaho 54, 675 P.2d 33 (1983) (Bistline, J., dissenting). Under *Tison,* the constitutional validity of a death sentence requires that it have been imposed based upon Hoffman's culpability, not that of the other perpetrators. No evidence was introduced at trial which would establish that Hoffman, as opposed to Wages, actually killed or intended to kill Denise, nor was a finding made that Hoffman acted with reckless indifference.

The court's finding at sentencing was as follows:

> "The defendant did willfully participate in the killing of Denise Williams. The defendant intentionally inflicted wounds on Denise Williams, by slashing her throat, that would have cause [sic] her death without immediate medical attention. The wounds were inflicted by the defendant with the intention of killing her." (Findings of the Court, Clerk's Record, 1448)

The testimony at trial on the question of whether Hoffman's wounds to Denise Williams' neck would have caused death came from Dr. Thomas M. Donndelinger, a pathologist. Dr. Donndelinger was asked specifically if the

neck wound would have lead to death, and testified that it appeared that it "had not gone far enough back to get the arteries and large veins in the neck." To be fatal, he opined, a "slashing wound" to the neck has to "get the carotid artery or the jugular vein." This wound had not. (RT at 788). Although the wound might have involved "bleeding that would look like a great deal of blood," it "would not be that likely to allow somebody to bleed to death in a short period of time." (RT at 793).

Accordingly, the only evidence at trial on the issue indicates the wound inflicted by Hoffman, and relied upon by the court as proof of his involvement in actually killing Denise, and as proof of the "heinous, atrocious and cruel" nature of the killing, would not have killed Denise Williams in a short period of time. The trial court's conclusion is unsupported by any evidence, is clearly erroneous, and denied Hoffman his rights under the Eighth and Fourteenth Amendments.

H. *THE SENTENCE OF DEATH IMPOSED ON PETITIONER WAS DISPROPORTIONATE TO THE SENTENCES IMPOSED ON OTHER INDIVIDUALS CONVICTED OF MURDER UNDER SIMILAR CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.*

The sentence of death imposed on Hoffman violated Petitioner's rights to due process and equal protection under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The sentence of death was disproportionate, and Idaho Code § 19-2827 fails to channel discretion in a meaningful way, in violation of Petitioner's right to due process.

Facts Supporting Petitioner's Claim

The trial court ordered that Max Hoffman be executed for the murder in this case. It did not order the same punishment for co-defendant Ronald Wages, who admitted conspiring with Richard Holmes to kill Denise Williams, admitted kidnapping her, admitted physically and verbally abusing her, admitted stabbing her under the arm and into her chest with the intent to kill her, and who admitted throwing the rock on her head which ultimately caused her death. As noted above, Hoffman's participation is actually limited to his inflicting a wound to Denise Williams' neck, which was not lethal.

Because "the death penalty is unique in its severity and irrevocability, . . . the State must focus on the *defendant's personal intent, character and culpability and not merely that of an accomplice before the death penalty may be constitutionally imposed.*" *State v. Scroggins,* 716 P.2d at 1159 (citing *Enmund v. Florida*) (Emphasis in original). Here, a focus on Hoffman's actual participation, when compared to Wages, reveals that the sentence of death is disproportionate. Wages was more responsible for the death than Hoffman, but he did not receive the death penalty.

The proportionality review of Petitioner's death sentence conducted by the Idaho Supreme Court requires the Court to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Idaho Code Section 19-2827. As such, Petitioner has a right not to be sentenced to death in an arbitrary and capricious fashion. However, the Idaho proportionality

statute fails to channel the discretion of the court in any meaningful way resulting in arbitrary and capricious decisions. The proportionality review does not inquire into whether the death sentenced individual intended to kill, and because the proportionality review allows comparison to cases in which defendants have been unconstitutionally sentenced to death, the statute, as well as the review by the trial court, and the Idaho Supreme Court was fatally defective.

I. *PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER, AND HIS DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY THE TRIAL COURT'S RULING THAT STATEMENTS OF RICHARD HOLMES WERE ADMISSIBLE.*

During the trial of the case, the court admitted certain statements of Richard Holmes on the ground that Hoffman was a co-conspirator, and Holmes' statements were made in furtherance of the agreement to murder Denise Williams. The admission of such statements attributable to Holmes denied Hoffman his rights to confront and cross-examine, and his right to due process.

Facts Supporting Petitioner's Claim

Two statements were offered at trial, and relied upon by the trial court at sentencing, which are attributed to Holmes. First, Holmes is reported to have told Longstreet that he would let Denise Williams "bleed to death like an animal." Second, Holmes is reported to have told Denise Williams that she was "dead meat," when he kicked her in the head at the ION cut-off earlier in the evening before

her death. With respect to the first statement, the evidence clearly established that Hoffman was not present when the statement was made.

With Holmes dead, the statements should not have been admitted or relied upon in imposing the death penalty. Hoffman was without any means of testing the proponent as to whether the statements were, in fact, made. Absent the ability to cross-examine Holmes, the admission violated the constitutional rights of the Petitioner.

J. THE IDAHO STATUTE AUTHORIZING THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT BECAUSE IT CREATES A MANDATORY PRESUMPTION IN FAVOR OF DEATH.

Petitioner was sentenced to death under an Idaho statute which creates a mandatory presumption in favor of the death penalty and is a violation of Petitioner's right to an individualized sentencing determination under the Eighth Amendment to the United States Constitution.

Facts Supporting Petitioner's Claim

Idaho's death penalty provides as follows:

> . . . Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstances found and make imposition of death unjust. Idaho Code § 19-2525(c).

In this case, as outlined above, the sentencing court found the existence of two aggravating circumstances. It

then was obliged (i.e., "the court shall") to sentence the defendant to death. This presumption in favor of execution denied Hoffman his rights under the Eighth Amendment.

K. *THE IDAHO STATUTE, WHICH FAILS TO REQUIRE A JURY TO SENTENCE, A PERSON TO DEATH, DENIED PETITIONER HIS RIGHT TO DUE PROCESS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT.*

Petitioner was sentenced to death under an Idaho statute which allows the sentencing judge to determine elements of the crime in violation of Petitioner's right under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to have a jury determine the elements of the crime. Petitioner's post-trial motion for a jury sentencing was denied.

L. *PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS DUE TO THE FAILURE OF THE SENTENCING JUDGE TO PROPERLY FIND AND WEIGH THE MITIGATING AND AGGRAVATING FACTORS.*

Petitioner's sentence of death is invalid under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution as a result of the failures of the sentencing judge as follows:

Facts Supporting Petitioner's Claim

(1) Petitioner's sentence of death resulted from the sentencing judge finding, as an aggravating factor, petitioner's specific intent to kill, when the intent to kill is a

factor that made him eligible to receive the death penalty in the first place. This double counting of the specific intent to kill renders Petitioner's sentence of death invalid under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

(2) Petitioner's sentence of death resulted from the sentencing judge finding as an aggravating factor that "defendant's record contains convictions for robbery, battery, kidnapping and murder." Petitioner had no prior conviction for murder, other than the one upon which he was tried, convicted, and thus eligible to receive the death penalty in the first place. This double counting renders Petitioner's sentence of death invalid under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

(3) At the post-conviction hearing, Judge Weston's comments concerning the desire of the victim's father that Hoffman not receive the death penalty, indicated he had failed to follow the proper weighing of mitigating and aggravating factors required by the Eighth Amendment and cases interpreting the Eighth Amendment. He said that the family's desire that Max not be sentenced to death "was not a mitigating factor that would outweigh the *aggravating factors* that the court found present in this case." *See*, *State v. Charboneau,* 116 Idaho 129 (1989).

(4) As noted above at paragraph A, the trial court's findings include acts that are deemed to be aggravating circumstances, but which were committed by other persons. Examples include the following:

(A) Denise was taken out to Owyhee County in the evening, stripped naked, tied up, physically and

verbally assaulted. These acts were committed by Slawson, Longstreet, Wages and Holmes.

(B) Denise was kicked in the head and told she was "dead meat." These acts were committed by Holmes.

(C) Hoffman intended Denise to suffer a "slow death" because *Holmes stated* he wanted her to "bleed to death like an animal."

The court's reliance on these factors renders Petitioner's sentence of death invalid under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

M. *THE IDAHO STATUTE GOVERNING POST-CONVICTION REMEDIES IN CAPITAL CASES DENIES PETITIONER DUE PROCESS AND EQUAL PROTECTION AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL AND MEANINGFUL APPELLATE REVIEW REQUIRED BY THE EIGHTH AMENDMENT.*

Petitioner's right to due process and equal protection of law under the Fifth and Fourteenth Amendments to the Constitution of the United States and to the effective assistance of counsel under the Sixth Amendment and a meaningful appeal required by the Eighth amendment, were denied by the forty-two (42) day time limit imposed for filing of post-conviction relief under Idaho Code, section 19-2719.

Facts Supporting Petitioner's Claim

Idaho Code Section 19-2719 requires that in a capital case, a person seeking post-conviction review other than on direct appeal, must file his motion for post-conviction

review within forty-two (42) days of the imposition of sentence by the trial court. Non-capital defendants had five years within which to file similar claims for post-conviction relief. The states cannot provide justification for such discrimination against those convicted of capital offenses.

Petitioner filed a petition for post-conviction relief which was denied by the trial court. Denial of the post-conviction petition was affirmed by the Idaho Supreme Court.

This statute prevented Petitioner from raising claims discovered during the pendency of the appeal, but which were discovered after the forty-two (42) day time period has passed.

In this case Petitioner was represented by the same counsel at trial, on direct appeal and in the state post-conviction petition. As argued above, this error denied Petitioner his right to the effective assistance of counsel.

The statutory time limit works to prevent a person convicted of a capital offense from investigating the matter fully to determine if claims exist which provide a sufficient basis to make a collateral attack on the conviction or on the sentence.

Because the same attorneys represented the Petitioner during trial and in post-conviction proceedings an inherent conflict exists so that there is no possibility that counsel will examine the record in the case to determine if the defendant received the effective assistance of counsel as required by the Constitution.

N. *THE TRIAL COURT ERRED BY ADMITTING STATEMENTS OF THE PETITIONER TAKEN IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.*

At trial, the trial judge admitted the following statements in violation of Petitioner's constitutional rights.

Facts Supporting Petitioner's Claim

(1) The court admitted statements purported to have been made by Petitioner to Ricky Williams, who was incarcerated with Petitioner prior to his being charged in this case. Hoffman filed a motion to suppress statements made to Ricky Williams on the ground that Williams was acting as an agent of the State at the time the statements were allegedly made. The trial court ruled in advance of trial, on March 16, 1989, that the statements were admissible because Ricky Williams was not acting as an Agent. At the time that Ricky Williams was trying to get information from Petitioner on the disappearance of Denise Williams, he had already met with the police in an attempt to gain an advantage in his pending case in exchange for information.

(2) The trial court admitted statements purported to have been made by Petitioner to Detective Richard D. Frizzel, while Hoffman was transported from the penitentiary to the courthouse in Murphy, Idaho, for a hearing on a suppression motion. Counsel moved to preclude introduction of the statements, but the trial court admitted the evidence. (RT at 1478). Detective Frizzel testified that Max told him he could not believe Richard Holmes had snitched, and that he did not know who had killed Denise

as both he (Hoffman) and Wages had "done her." (RT at 1466).

Admission of these statements by the court was in error, and a denial of the Petitioner's Fifth, Sixth, and Fourteenth Amendment rights.

14. Petitioner has filed no other applications seeking relief from the federal courts under 28 USC §2254.

15. Petitioner was serving a sentence of ten years in prison with five years fixed, for aiding and abetting second degree kidnapping at the time of his conviction on these charges.

WHEREFORE, Petitioner prays that the Court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint, and/or in the alternative that he be relieved of his unconstitutional sentence;

2. Grant such other and further relief as may be appropriate and to dispose of the matter as law and justice require.

DATED this 11th day of September, 2001.

CAPITAL HABEAS UNIT

/s/ Joan M. Fisher
Joan M. Fisher

Ellison Mathews
Attorneys for Petitioner

VERIFICATION

I, Joan M. Fisher, a person over the age of eighteen, competent to testify and acting on behalf of Petitioner as his court-appointed counsel, hereby declares under penalty of perjury I am fully familiar with the foregoing and state it is true and correct to the best of my knowledge, information and belief.

Endorsed and subscribed hereto on September 11, 2001.

/s/ Joan M. Fisher
Joan M. Fisher

NO. 07-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

A. J. ARAVE,
Petitioner,

v.

MAXWELL HOFFMAN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent paraphrases Petitioner's questions as follows:

1. Does the reference to "gross error" in this Court's 1970 opinion of *McMann v. Richardson* superimpose a higher level of deficient performance than was later established in *Strickland v. Washington*?

2. Does *Hill v. Lockhart* impose a higher, more rigid pleading and proof requirement than *Strickland v. Washington*, including in part a demand of specific wording the lack of which can be challenged for the first time on a petition for rehearing and suggestion for rehearing *en banc* to the Court of Appeals?

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NO. 07-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

A. J. ARAVE,
Petitioner,

v.

MAXWELL HOFFMAN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent paraphrases Petitioner's questions as follows:

1. Does the reference to "gross error" in this Court's 1970 opinion of *McMann v. Richardson* superimpose a higher level of deficient performance than was later established in *Strickland v. Washington*?

2. Does *Hill v. Lockhart* impose a higher, more rigid pleading and proof requirement than *Strickland v. Washington*, including in part a demand of specific wording the lack of which can be challenged for the first time on a petition for rehearing and suggestion for rehearing *en banc* to the Court of Appeals?

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BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Maxwell Hoffman, by and through his attorneys, Joan M. Fisher and Ellison Matthews, files this Brief in Opposition to the Petition for Writ of Certiorari and respectfully requests that the Court decline *certiorari* review to the Ninth Circuit Court of Appeals. The Court of Appeals' decision and its application of longstanding president to the facts of the plea bargaining process is correct, is consistent with this Court's and the Circuit Court of Appeals' decisions and involves no question of exceptional importance. The State's petition should be denied.

STATEMENT OF THE CASE

Maxwell Hoffman's limited ability to perceive and understand the complex proceedings to which he has been subjected, the lack of fundamental fairness in the proceedings which led to the imposition of the death penalty, and the relative culpability of the actors underlie the issues here.

The District Court summarized best Mr. Hoffman's unique history:

> There is no question that Hoffman suffered from mental, intellectual and drug abuse problems in the years leading up to the murder of Denise Williams. Hoffman was raised in a violent and abusive household, and was both a victim of abuse, and exposed to the abuse of his siblings. After his father's death when Hoffman was 10 years old, Hoffman's mother placed him in foster care because of his behavior problems. Hoffman was admitted to the Metropolitan State Hospital in California, when he was 24 years old, and was diagnosed with "psychosis manifested by delusional and violent behavior," and anti-social personality disorder.
>
> Hoffman also has significant problems learning, and is not well-educated. At the time of the offense Hoffman could not read or write, and could not be taught to read or write. Hoffman has had numerous IQ tests over the years. The most recent testing indicated that Hoffman's IQ is 74. This puts Hoffman in the borderline mentally retarded range.

Hoffman v. Arave, No. 94-0200, 11 (D. Idaho, Mar. 30, 2002); App. at 11.

The Ninth Circuit Court of Appeals set out the relevant factual background relating to the murder:

> The facts of the murder of Denise Williams have been recounted in numerous prior decisions in state and federal courts, and are recited only briefly here.[1] Hoffman was employed by Richard Holmes, a drug dealer. Williams, a police informant, initiated a controlled buy with Holmes, and as a consequence, Holmes was arrested for distributing controlled substances. After Holmes was released on bail, Sam Longstreet and Jeff Slawson, two of Williams's friends, went to meet with Holmes to assure him that they had nothing to do with his arrest. Holmes brokered a deal for these two friends to deliver Williams to Holmes at a camp in Idaho. Longstreet and Slawson dropped Williams off and left her with Ron Wages, one of Holmes's associates. Thereafter, Hoffman and Holmes went to the camp and met up with Wages and Williams. Holmes kicked Williams in the head, and told Williams that she was "a dead bitch." Holmes told Hoffman and Wages, "You know what to do," and left.
>
> Hoffman, Wages, and Williams drove around for several hours. Hoffman and Wages forced Williams to write letters exonerating Holmes of the controlled substances charges. At some point, Hoffman stopped the car and took Williams into a cave. He cut her throat while Wages waited in the car. As Hoffman was coming back to the car, Williams began to crawl up an embankment near the cave. Wages ran over to Williams, and stabbed her with the knife Hoffman was carrying. Wages then began to bury her with rocks, and Hoffman joined in. The evidence showed that Williams might have eventually died either from the original cut by Hoffman or from the wound inflicted by Wages, but that the actual cause of death was a blow from a rock.
>
> Hoffman and Wages then drove to Wages's[sic] sisters' house, where the two cleaned the car, and burned their clothes and Williams's[sic] clothes. Later, at Holmes's[sic] house, Hoffman cut up the knife with a cutting torch.

Hoffman v. Arave, 455 F. 3d 926, 928-29 (9th Cir. 2006).

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[1] *See Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001); *Hoffman v. Arave*, 73 F.Supp.2d 1192 (D. Idaho 1998); *Hoffman v. Arave*, 973 F.Supp. 1152 (D. Idaho 1997); *Hoffman v. State*, 142 Idaho 27, 121 P.3d 958 (2005); *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993).

The Ninth Circuit also set out the relevant procedural history.

A. Idaho State Proceedings

On August 22, 1988, Hoffman was charged with first-degree murder. The court appointed William Wellman as counsel. Wellman had never tried a murder case, and had no formal training on defending capital cases. At the time he was selected to represent Hoffman, Wellman had done contract work with the Owyhee County public defender's office for several years, and criminal defense work constituted about half of his practice.

Five weeks before trial, the State offered Hoffman a plea bargain: If Hoffman would plead guilty to first-degree murder, the State would not pursue the death penalty. The State also made clear that it intended to seek the death penalty if Hoffman rejected the plea agreement. Wellman advise Hoffman that he should reject the plea agreement. Wellman believed that the Idaho death penalty scheme was unconstitutional based on *Adamson v. Ricketts*, 865 F.2d 1011, 1023-28 (9th Cir.1988) (en banc), *abrogated by Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), where this court found Arizona's death penalty scheme unconstitutional. Wellman saw no material difference between Arizona's death penalty scheme and the death penalty scheme in Idaho. He thus recommended that Hoffman reject the plea agreement because he believed it was only a matter of time until Idaho's death penalty scheme would be declared unconstitutional as well. Hoffman took Wellman's advice and rejected the plea agreement.

In February 1989, only three weeks before trial, the court appointed co-counsel Charles Coulter. Coulter had tried two vehicular manslaughter cases, but that was the extent of his homicide experience. He had no experience with capital cases.

The guilt phase of Hoffman's trial commenced on March 7, 1989. The jury heard eight days of testimony. Defense counsel presented no evidence of Hoffman's mental capacity on the night of Williams's murder. Instead, Wellman and Coulter's central strategy was to paint Wages as the more culpable of the two.[2] After five hours of deliberation, the jury returned a conviction for first-degree murder and found a sentencing enhancement, making Hoffman "death eligible."

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[2] At trial, Wages was one of the principle witnesses against Hoffman. In exchange for Wages' testimony, the prosecution agreed not to seek the death penalty against him. Both Longstreet and Slawson pleaded to second-degree kidnaping charges. The prosecution recommended a sentence of at least six months in jail, and each received a sentence of only one year in jail. Holmes was originally charged with kidnaping as well, but was killed in prison before he was brought to trial. Thus, in the end, the State pursued the death penalty only against Hoffman.
Hoffman v. Arave, 455 F.3d at 929.

The sentencing phase of the trial began on June 9, 1989. After weighing the aggravating and mitigating circumstances, the court imposed the death penalty.[3] On July 25, 1989, Hoffman filed a post-conviction petition in state court. The state court denied the petition. On January 29, 1993, the Idaho Supreme Court affirmed Hoffman's sentence. *See Hoffman,* 851 P.2d at 945.

B. Federal Habeas Proceedings

Hoffman filed an initial habeas petition in the United States District Court for the District of Idaho on December 1, 1994. On June 13, 1997, the district court dismissed several claims on the grounds of procedural default. On December 28, 1998, the district court dismissed the remainder of the claims on their merits. On January 3, 2001, we concluded that Hoffman's ineffective assistance of counsel claims were not procedurally barred. *See Hoffman,* 236 F.3d at 535-36. We also held that Hoffman's pre-sentencing interview conducted by the state probation officer was a "critical stage" of the proceeding, during which the Sixth Amendment right to counsel attached. *See id.* at 540-41. We remanded for further evidentiary hearings on Hoffman's ineffective assistance of counsel claims, and for a finding whether the deprivation of counsel during the pre-sentencing interview was harmless. *See id.* at 542-43. We affirmed dismissal of the remainder of Hoffman's claims. *See id.*

On remand, the district court held a five-day evidentiary hearing. The court heard substantial expert testimony about Hoffman's mental capacity, and testimony from Hoffman's trial counsel. After hearing oral argument by both parties, the district court granted Hoffman's habeas petition in part and denied it in part. The district court rejected three of Hoffman's ineffective assistance of counsel claims, specifically that counsel: (a) failed to challenge Hoffman's competency to stand trial; (b) advised Hoffman to reject a plea agreement that would have foreclosed the State from seeking the death penalty; and (c) failed to investigate or present evidence of Hoffman's diminished capacity at trial.

But the district court did accept one of Hoffman's ineffective assistance of counsel claims: that Hoffman had received ineffective assistance of counsel during sentencing. The district court found that Wellman and Coulter had not sufficiently investigated and presented mitigation evidence at sentencing that might have kept the trial judge from imposing a death sentence. The district court also found that the state trial judge's

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[3] The Ninth Circuit noted, "[t]he Idaho death penalty scheme in existence at the time of Hoffman's sentencing called for the judge, not a jury, to decide whether the death penalty was warranted. *See State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, 315-17 (1989), *withdrawn and superseded by* 124 Idaho 497, 861 P.2d 67 (1993). To impose the death penalty, the court had to find that the mitigating factors, considered cumulatively, did not outweigh the gravity of each aggravating factor, considered separately." *See Hoffman*, 455 F.3d at 930.

> decision to deprive Hoffman of counsel during the pre-sentence interview was not harmless because it "dictated" trial counsels' sentencing strategy. The district court granted the habeas petition on these two claims and ordered the State to re-sentence Hoffman within 120 days of its order.

Hoffman v. Arave, 455 F.3d at 929-30. The Court granted relief finding that trial counsel's representation of Hoffman during the plea bargaining stage was ineffective.

Counsel's Ineffective Assistance During the Plea Process

On February 6, 1989, the Owyhee County prosecutor proposed that Hoffman plead guilty to first-degree murder in exchange for an agreement by the State not to pursue the death penalty against Hoffman during sentencing. The offer expired ten days later on February 16, 1989.

Counsel's research yielded the Ninth Circuit opinion, *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) in which the circuit court invalidated Arizona's death penalty scheme. Counsel recognized that both the Arizona and Idaho death penalty schemes allowed judges to make factual determinations to support a death sentence. *Adamson* proclaimed this practice unconstitutional. *Id.* at 1029-39. Based on the similarities between the Arizona and Idaho schemes at the time, counsel advised Mr. Hoffman to reject the State's offer.

In the month preceding the State's offer but after *Adamson*, the legal landscape altered notably with no sign of calming during the ten day duration of the State's offer. The Arizona Supreme Court decided *State v. Walton*, 769 P.2d 1017 (Ariz. 1989), *overruled in part by Ring v. Arizona*, 536 U.S. 584, 603 (2002), reaffirming its position that jury sentencing was not constitutionally mandated in death penalty cases; two challenges to Idaho's death penalty scheme were raised on an *Adamson* theory and a mere four days prior to the State's offer, the Ninth Circuit stayed the mandate in *Adamson* until the Supreme Court chose to grant or deny a Writ of

Certiorari. At the time of the plea offer, the Arizona Supreme Court decision in *Walton* was in direct conflict with the Ninth Circuit decision in *Adamson*. Counsel was unaware of this conflict.

The Ninth Circuit in the present matter did not find it unreasonable that counsel failed to predict which of the theories would eventually become the law, nor did it find unreasonable counsel's attempt to draw a connection between the Arizona and Idaho statutes, or even for arguing a reasonable extension of the Ninth Circuit's precedent. However, the Ninth Circuit found:

> [C]ounsel advised Hoffman to give up the certainty of avoiding the death penalty so that he could go to trial, a risky proposition with a substantial downside. More importantly, he offered this flawed advice without conducting reasonable research into the legal landscape. We therefore conclude that Wellman's legal representation of Hoffman during the plea bargaining stage was not objectively reasonable.

Hoffman v. Arave, 455 F.3d 941 (9th Cir. 2006).

As a result of this deficient performance, the court also found that Hoffman suffered prejudice:

> Had Hoffman been presented with an accurate evaluation (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea.

Id. at 942.

REASONS FOR DENYING THE PETITION

Petitioner's ("State") challenge of the Ninth Circuit's application of longstanding precedent is not a compelling reason for the Court to grant a Writ of Certiorari. S. Ct. R. 10 (2007). This case does not deserve a Writ of Certiorari.

In the proceedings below, the Ninth Circuit Court of Appeals applied the long standing precedent of *Strickland v. Washington*, 466 U.S. 668 (1984). Despite arguments to the contrary, the Court of Appeals followed the appropriate legal standards without opening the door to "a cavalcade of challenges." Petition at 9. The Ninth Circuit made conscious efforts to "eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and . . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689. As a result, the Court found that counsel's failure to completely research the law, in light of the precipitous consequences facing Mr. Hoffman, fell below "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687.

The Circuit Court then determined that the prejudicial effect of counsel's unprofessional conduct resulted in a reasonable probability that, but for counsel's errors, Mr. Hoffman would have accepted the prosecution's offer and pled guilty. Mr. Hoffman complied with all of the necessary pleading requirements to establish that there was a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional error. Despite Petitioner's protestations, the Ninth Circuit established no new standards or precedents.

I.

THE NINTH CIRCUIT REASONABLY APPLIED LONGSTANDING SUPREME COURT PRECEDENT TO A PARTICULARIZED FACT PATTERN, ADOPTED NO NEW STANDARDS, AND CREATED NO NEW PRECEDENTS

A. Counsel's Actions Fell Below an Objective Standard of Reasonableness - the Proper Standard Which Encompasses Any Alleged 'Gross Error Standard'

1. The State Demands a Higher Standard of Deficient Performance Than *Strickland*

Petitioner first argues that this Court must grant its Petition for Writ of Certiorari because the Ninth Circuit failed to follow the 'gross error standard' allegedly established in *McMann v. Richardson*, 397 U.S. 759 (1970). The State asserts that "[i]n the context of recommending a client plead guilty, when the client is informed of the plea offer, the defendant 'must demonstrate gross error on the part of counsel.'" Petition at 11, *quoting McMann*, 397 U.S. at 772. Petitioner's reliance on the single quotation is misplaced. *McMann* does not offer any reasonable analysis as to the establishment and implementation of the purported 'Gross Error Standard.' There is no further discussion, no citation, internally in *McMann* or to any other case, where the Court provides instruction as to the method in which the lower courts are to interpret and employ this 'Gross Error Standard.' In fact, nowhere in *McMann* is the phrase, 'gross error' used other than in the quotation asserted by Petitioner. The case law Petitioner cites as supporting *McMann* also fails to discuss the issue. Each case cited in support of the 'Gross Error Standard' relies exclusively on *McMann* as the foundation for this theory.[4]

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[4] *Turner v. Calderon*, 281 F.3d 851(9th Cir. 2002), which followed *McMann*, is itself cited only seven times; never as support of application of a 'Gross Error Standard.' Of those citations, four are for the proposition that trial counsel are not required to predict what a jury will do, two for the proposition that plea negotiations constitute a critical stage in the trial process for Sixth Amendment purposes, and one stating that *Strickland* applies to claims of ineffective assistance of counsel arising out of the plea process.

Another fault in relying upon the 'Gross Error Standard' is that it ignores clearly established precedent. *Strickland* has been applied in the context of challenges to a defendant's Sixth Amendment right to the effective assistance of counsel since 1984. *McMann* is the predecessor of *Strickland*. To rely on a single phrase from a prior case would be stepping back in time. While *McMann* may speak to the context of rejecting a plea offer in 1970, any standards would be, and in fact were, replaced by the *Strickland* two-prong ineffective assistance of counsel test, the test properly applied by the Ninth Circuit.

> As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.' When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

Strickland, 466 U.S. at 687-88, *quoting, McMann v. Richardson*, 397 U.S. at 770, 771 (internal citations omitted).

Wade v. California, 450 F.2d 726 (9th Cir. 1971), was last cited in 1974 to support the position that a prisoner had exhausted each of his remedies. *Harris v. Sup. Ct. of Cal.*, 500 F.2d 1124 (9th Cir. 1974).

Finally, and perhaps most telling is, *Long v. Brewer*, 667 F.2d 742 (8th Cir. 1982) which was cited in note 24 of the Attorney General of Florida's Brief of Petitioner in *Strickland v. Washington* as an example of "behavior that fell miserably below that which might be expected from an ordinary fallible lawyer" to support the idea that "[w]ithout guidance from this Court, various courts have extended the McMann 'standard' to all Sixth Amendment ineffective assistance claims in general and have affirmatively abandoned any fair trial/fundamental due process analysis, in favor of a labyrinth of lists and a mush of semantics conceived in the serenity of the appellate process." Strickland v. Washington Briefs, Petitioner's Brief, 1982 U.S. Briefs 1554. What Petitioner in this case should have realized was that each of these cases, all decided prior to the advent of *Strickland* and its two prong test for ineffective assistance of counsel, point directly towards the proper standard.

2. Counsel's Sole Reliance on an Incomplete Understanding of the Law Falls Below an Objective Standard of Reasonableness

The Circuit Court correctly held that counsel's sole reliance on *Adamson* "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel relied exclusively on *Adamson v. Ricketts*, 865 F.2d at 1028-29 and advised Mr. Hoffman to reject a plea offer that would eliminate the possibility of receiving a death sentence. Soon after the *Adamson* decision, however, the Arizona Supreme Court reaffirmed its opinion as to the constitutionality of its death penalty scheme. Further, shortly before the State extended the plea offer, the Ninth Circuit granted a stay of the mandate of *Adamson* pending a United States Supreme Court ruling and the Arizona Supreme Court reaffirmed its position in direct conflict with the Ninth Circuit. *See State v. Walton*, 769 P.2d 1017 (1989), *overruled in part by Ring v. Arizona*, 536 U.S. 584 (2002). Having based his decision on *Adamson* from weeks prior and the similarity of the Arizona and Idaho death penalty schemes, counsel advised that Mr. Hoffman reject the State's plea offer. Counsel was inexcusably unaware of how rapidly the law was changing at the time of the plea offer. As such, his decision to advise Mr. Hoffman to reject the offer was made without a clear understanding of what the law was at the time.

> [W]ith the state of the law in turmoil both in Arizona and in Idaho, and with conflicts between this court and the state supreme courts of both states, a reasonable attorney would have recognized the substantial risk of advising a client to reject a plea agreement. Because [counsel] possessed a deficient understanding of the law, he led Hoffman to believe that his sentence would be the same whether he accepted the plea bargain or was convicted at trial.

Hoffman v. Arave, 455 F.3d at 926, 941.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688. The "[p]revailing norms of practice

as reflected in American Bar Association standards . . . are guides to determining what is reasonable . . . ." *Id.* at 689.

Each attorney possesses a "duty under the Rules of Professional Conduct to 'provide competent representation to a client,' which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases R. 6.1 (2003) (*quoting* ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 1 (2007)). *See also* ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2007) (Competent handling of a particular matter includes inquiry into and analysis of . . . legal elements of the problem . . . adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation . . . require[s] more extensive treatment than matters of . . . lesser complexity and consequence).

Petitioner scoffs at the Ninth Circuit's concern that "[Mr. Hoffman] risked much in exchange for very little." Petition at 9. The Ninth Circuit's opinion recognizes that the consequences of litigation *do* in fact play a significant role in the determination of counsel's competence. In fact, the greater the risk, the greater the degree of competence required. "The required attention and preparation are determined in part by what is at stake." Model Rules Prof'l Conduct 1.1 cmt. 5 (2007). While Petitioner argues that "no jurisdiction has required an attorney to assess the validity of a federal circuit case based upon the degree of risks associated with receiving a particular sentence," Petition at 16, it blindly ignores the wisdom and guidance provided by the Model Rules.

In light of this principle, the Ninth Circuit found that, "[i]f there was a high probability that Hoffman was not going to receive the death penalty, [counsel] might have been reasonable in

considering our decision in *Adamson* as an additional reason to reject the plea agreement." *Hoffman v. Arave*, 455 F.3d. 926, 941. "But Hoffman's chance of receiving the death penalty was not minimal, a fact that counsel vastly underestimated and that made counsel's failure to investigate *Adamson* more disastrous." *Id.*

Petitioner argues that "[i]t is incomprehensible that *Adamson* is 'good law' if there was not a 'high probability Hoffman was going to receive the death penalty,' but 'bad law' if there was a high probability that he would receive the death penalty." Petition at 16. This argument misstates the Ninth Circuit's position. It isn't that the character of *Adamson* changes depending upon the penalty to be imposed, but rather, the standard by which the courts measure the competence required of counsel in a given matter and therefore, the standard by which the courts measure the effectiveness of counsel that changes depending upon the consequences of the litigation. *See Strickland*, 466 U.S. at 687-89; Model Rules of Prof'l Conduct 1.1 cmt. 5 (2007). Thus, the correct position is precisely stated by the Ninth Circuit. "If there was a high probability that Hoffman was not going to receive the death penalty, [counsel] might have been reasonable in considering our decision in *Adamson* as an additional reason to reject the plea agreement." *Hoffman*, 455 F.3d. at 941. "But Hoffman's chance of receiving the death penalty was not minimal, a fact that counsel vastly underestimated and that made counsel's failure to investigate *Adamson* more disastrous." *Id.* By following *Strickland*, the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, and the Model Rules of Professional Conduct, "risking much" increased the demand for competent representation by counsel. As a result, counsel's actions fell below an objective standard of reasonableness when

he advised Mr. Hoffman to reject a plea offer based on a sole reading of *Adamson* without understanding the rapidly changing legal landscape.

B. The State's Claim That Mr. Hoffman Failed to Plead Facts Sufficient under *Hill* Comes Too Late and Mr. Hoffman Has Pled Facts More than Sufficient to Satisfy Any Pleading Requirement

1. The State is Procedurally Barred from Arguing that Mr. Hoffman Failed to Plead Facts Sufficient Under *Hill* When it Raised the Argument for the First Time in its Request for Rehearing

The State argued for the first time that Mr. Hoffman hadn't *affirmatively stated* in his Writ of Habeas Corpus that he would have accepted the plea offer but for counsel's unprofessional errors in its Request for Rehearing With Suggestion for Rehearing En Banc. The State did not raise this argument in the district court. Nor did it raise this issue in its appeal to the Ninth Circuit. A party may not raise new and additional matters for the first time in a petition for rehearing. *United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997); *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1169 (1st Cir. 1991) ("[a] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the circuit court"); *FDIC v. Massingil*, 30 F.3d 601 (5th Cir. 1994); *Cosco v. United States*, 922 F.2d 302 (6th Cir. 1990); *Pentax Corp. v. Robison*, 135 F.3d 760 (Fed. Cir. 1998); *Lockard v. Equifax, Inc.*, 163 F.3d 1259 (11th Cir. 1998). The State must not be permitted to raise the issue in a Petition for Writ of Certiorari.

2. Mr. Hoffman Pled Facts Sufficient to Satisfy Pleading Requirements Mentioned in *Hill*

The State places particular emphasis on the Court's opinion in *Hill v. Lockhart*, 474 U.S. 52 (1985). "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to

trial." *Id.*, at 60. What the State fails to appreciate is the very next sentence of the *Hill* opinion. "He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill* does *not* create a *per se* rule whereby a defendant *must affirmatively state* that but for counsel's unprofessional errors, they would have acted differently.

Mr. Hoffman pled special circumstances that support the conclusion that he placed particular emphasis on the importance of the plea process; namely, that he suffers from a diminished mental capacity resulting in a compliant personality.

> Had Petitioner been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood Petitioner's mental state including his brain damage, dyslexia, mental illness including psychosis, and mental retardation, counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

Second Amended Petition for Writ of Habeas Corpus at 19.

These special circumstances support the Court of Appeals' conclusion that Mr. Hoffman relied entirely on the wisdom of counsel in determining whether to accept a plea agreement or not. Had counsel made himself competently aware of the general landscape of the law, his advice to Mr. Hoffman would have been different and Mr. Hoffman would have followed that advice and pled guilty.

3. The Ninth Circuit Correctly Found That There Was a Reasonable Probability That Counsel's Unprofessional Errors Prejudiced Mr. Hoffman

"Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. 668, 692 (1984); *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003); *Cullen v. United States*, 194 F.3d 401, 403 (2nd

Cir. 1999); *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001). Despite the State's argument that Mr. Hoffman must "prov[e] prejudice," Petition at 18, the Court has held that, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Counsel specifically advised Mr. Hoffman that as a result of the Arizona case, *Adamson v. Ricketts*, he *would not* be executed due to the similar statutory language of the Arizona and Idaho schemes. This advice remained unchanged and unaltered through trial and conviction. As a result and in reliance on counsel's erroneous advice, Mr. Hoffman rejected a plea bargain which would have foreclosed the State from seeking the death penalty. Mr. Hoffman therefore proceeded to trial due to the advice of trial counsel that he *would not* be executed regardless of the outcome.

Mr. Hoffman possessed a compliant personality. "Wellman testified that Hoffman had a 'compliant personality,' and would frequently defer to Wellman's decision-making." *Hoffman*, 455 F.3d at 942. Mr. Hoffman was quoted by trial counsel at the evidentiary hearing as saying, "Well, Bill you are the lawyer, you know, you know more about it than I do." *Id.* Mr. Hoffman's other trial counsel testified that Mr. Hoffman would frequently defer to the decisions of his attorneys, further lending credence to his compliant nature and the reasonable probability that he would have pled guilty but for counsel's unprofessional errors. *Id.* "This strongly suggests that, had [counsel] fully presented Hoffman's options and told Hoffman that he was

giving up very little in exchange for the security of the death penalty being off the table, Hoffman probably would have gone along with Wellman's suggestion and would have accepted the plea agreement." *Id.*

The dissent from the Ninth Circuit's denial of the State's Request for Rehearing with Suggestion for Rehearing En Banc voice concern that Mr. Hoffman has not pled that he would have accepted the plea if he were competent. This mischaracterizes the pleadings as Mr. Hoffman has in fact pled that, "counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty." Second Amended Petition for Writ of Habeas Corpus at 19. In the preceding sentence, the phrase 'would have' modifies two subsequent actions. Thus, "[h]ad Petitioner been properly advised . . . counsel could have secured . . . treatment that would have rendered Petitioner sufficiently competent . . . and [would have] plead guilty. The pleadings show that if Mr. Hoffman had been advised properly, and had counsel sought proper attention for Mr. Hoffman's mental deficiencies, he would have plead guilty. In any event, the evidence shows that if advised properly by counsel, he would have accepted the plea agreement offered by the State.

Counsel's advice to Mr. Hoffman would have been different if he competently researched the general landscape of the law at the time. Counsel would have recognized that there was in fact a very real chance that the Idaho courts would uphold the death penalty scheme in Idaho. Furthermore, counsel would have deduced that there was little, if anything to gain by going to trial that could not be secured through accepting the plea offer. Thus, there was unquestionably more than a reasonable probability that, but for counsel's unprofessional errors, his advice to Mr.

Hoffman would be different and a reasonable probability that Mr. Hoffman would have accepted the plea.

> Had Mr. Hoffman been presented with an *accurate evaluation* (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea.

Hoffman, 455 F.3d at 942.

While the judges dissenting from the Ninth Circuit's denial of the State's Request for Rehearing with Suggestion for Rehearing En Banc disagree with the finding of the panel, their reasoning fails to honor *Strickland*. They create a higher standard by which a defendant must 'prove' prejudice as opposed to showing a *reasonable probability* that they were prejudiced, as required by *Strickland*. "*Hill v. Lockhart*, requires more: (1) an allegation in the habeas petition that but for counsel's ineffective assistance, petitioner would have pleaded guilty and (2) **proof** - not just post-hoc appellate court speculation - that petitioner would have accepted the plea agreement had the attorney correctly advised the petitioner." *Hoffman v. Arave*, 481 F.3d 686, 688-89 (2007) (internal citations omitted) (emphasis added). The dissenting judges would impose a greater burden on Mr. Hoffman than the Court permitted in *Strickland*. "[A] defendant *need not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693; *see also Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) ("[*Strickland*] specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered").

Mr. Hoffman was prejudiced by the unprofessional errors of counsel. But for those errors, there is a reasonable probability that counsel would have realized there was little, if anything to gain from trial; a substantial risk of receiving a death sentence; and that Idaho's death penalty scheme would likely be upheld and advised Mr. Hoffman to accept the State's plea offer. Further, due to his reliance upon trial counsel and his diminished mental capacity leading to his compliant nature, there is more than a reasonable probability that Mr. Hoffman would have accepted the State's offer.

II.

THE STATE FAILS TO STATE A COMPELLING REASON TO GRANT CERTIORARI

The State has not, and cannot, show a conflict in the courts or even a deviation from the usual course of proceedings. Rather, the State's Petition claims, first, that the panel misapplied the law of the deficient performance prong of the law on ineffective assistance of counsel, and second, that the panel made erroneous factual findings as to the prejudice prong. Petition at 10, 16. These are insufficient bases for review on *certiorari*. *See* Supreme Court Rule 10.

On the law, the panel's unanimous decision is entirely consistent with this Court's authority and that of other circuits. Contrary to the State's assertions, the panel did not require "defense counsel to be prescient about the direction a law will take," Petition at 16, but rather made a routine application of the twenty-three-year old *Strickland* rule. *See Hoffman v. Arave*, 455 F.3d 926, 931, 941-42 (9th Cir. 2006) ("We do not expect counsel to be prescient about the direction the law will take.") (citing *Strickland v. Washington*, 466 U.S. at 694).

Here, the Court of Appeals was not wrong on the law (as evidenced by the denial of rehearing under Federal Rule of Appellate Procedure 40 and the opinion's reasoning), and closely scrutinized the facts. The Court of Appeals' opinion accurately reflects the law of ineffective assistance generally, and specifically ineffective assistance at plea bargaining. *See Hoffman*, 455 F.3d at 941-42 (citing *Strickland v. Washington*, 466 U.S. at 694; *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003); *Cullen v. United States*, 194 F.3d 401, 403-04 (2nd Cir. 1999); *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001); and *Meyers v. Gillis*, 142 F.3d 664, 666-68 (3rd Cir. 1998)). This Court has held steady to the law of effective assistance of counsel for over twenty years. The opinion below does nothing more than apply a set of facts to the well-established standards.

This Court should not take up the factual issue of whether Mr. Hoffman would have accepted the plea offer. "[C]ertiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases," *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring), and should be used only in those "cases of peculiar gravity and general importance" or to secure uniformity in the Circuits. *Rogers v. Missouri P.R. Co.*, 352 U.S. 521, 531 (1957) (Frankfurter, J. dissenting) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). This Court does not seek to correct factually erroneous decisions, and instead looks for cases "involving unsettled questions of federal constitutional or statutory law of general interest." Rehnquist, The Supreme Court: How it Was, How it Is 269 (1987). This is not that case.

Petitioner has failed to state a compelling reason for the Court to grant *certiorari* review. This case does not involve an important question of federal law, nor does this decision conflict

with any other circuit court decision or the decision of a state court of last resort. Further, Petitioner is grasping at straws as it attempts to find new standards and precedents in the Ninth Circuit's opinion. It turns a blind eye to the Ninth Circuit's reasonable application of a twenty-three year precedent to the facts of this case. Petitioner cannot be permitted to litigate an issue raised for the first time in a Petition for Rehearing before a circuit court. Mr. Hoffman has pled and provided substantial evidence to support the Ninth Circuit's finding that counsel's failure to completely research the law and then advise Mr. Hoffman to reject a plea offer that would foreclose the State from seeking the death penalty fell below an objective standard of reasonableness. The Ninth Circuit also properly found that there was a reasonable probability that Mr. Hoffman was prejudiced by counsel's unprofessional errors and that, but for counsel's errors, he would have accepted the plea offer.

CONCLUSION

Therefore, for the reasons and arguments above, Mr. Hoffman respectfully requests that the court DENY the State's Petition for a Writ of Certiorari.

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In The

Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MAXWELL HOFFMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

A. To Establish Deficient Performance, Hoffman Was Required To Establish Wellman's Recommendation Constituted Gross Error, Without The Distorting Effects Of Hindsight

Hoffman contends Petitioner's reliance upon the requirement that he "must demonstrate gross error on the part of counsel," is misplaced because it constitutes "reliance on [a] single quotation" expressly articulated in *McMann v. Richardson*, 397 U.S. 759, 772 (1970). Brief in Opp. at 8. However, because this Court has never stated it was overruling *McMann*, or abandoning the gross error requirement, even after the advent of *Strickland v. Washington*, 466 U.S. 668 (1984), numerous jurisdictions have relied upon this requirement in determining the success of ineffective assistance of counsel claims in the context of providing advise regarding the acceptance or rejection of plea offers. The most recent circuit decision comes from *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002), which the panel ignored. Not only does *Turner* rely upon *McMann*'s gross error requirement, it also notes the Third Circuit's interpretation of the standard, "requiring a defendant to demonstrate that 'the advice . . . he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the [plea] offer.'" *Turner*, at 880 (quoting *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992)).

Relying upon *McMann*, federal district courts have also utilized the gross error requirement. *See*,

e.g., *Wilson v. United States*, 2007 WL 2237673, *8 (D. Ariz. 2007); *Crespo v. Mendoza-Powers*, 2007 WL 549748, *11 (E.D. Cal. 2007); *Guerrero v. Fizer*, 2006 WL 3333096, *5 (D. Ariz. 2006); *Fehr v. United States*, 2006 WL 1851385, *2 n.2 (W.D. Tex. 2006); *Aragon v. Carey*, 2003 WL 21018221, *6 (N.D. Cal. 2003).

Likewise, numerous states, both prior and subsequent to *Strickland*, have relied upon *McMann*'s requirement that gross error be demonstrated. *See*, *e.g.*, *Coon v. Weber*, 644 N.W.2d 638, 643 (S.D. 2002) ("They must show not just deficient performance but gross error by counsel in recommending that they plead guilty"); *State v. Carr*, 665 So.2d 1234, 1236 (La. Ct. App. 1995) (The Court ultimately held the defendants must demonstrate gross error by counsel in recommending the plea"); *Williams v. State*, 349 N.W.2d 58, 62 (S.D. 1984) (citing *Long v. Brewer*, 667 F.2d 742 (8th Cir. 1982) ("In order to invalidate a guilty plea, appellant must show gross error on the part of counsel in recommending that he plead guilty"); *State v. Stai*, 335 N.W.2d 798, 801 (N.D. 1983) ("petitioner must demonstrate gross error on the part of his attorney in recommending that he plead guilty"); *Mitchell v. State*, 609 S.W.2d 333, 519 (Ark. 1980) ("It also seems from *McMann*, that, in order to be entitled to post-conviction relief, Mitchell must '. . . . demonstrate gross error on the part of counsel when he recommended that the defendant plead guilty instead of going to trial. . . .'"); *Scarborough v. State*, 278 So.2d 657, 658 (Fla. Dist. Ct. App. 1973) ("Appellants legal representation met the

'range of competent advice' standard of *McMann* . . . , which held that gross error on the part of counsel must be demonstrated when he recommended that the defendant plead guilty instead of going to trial"). However, in *Commonwealth v. Taylor*, 296 A.2d 823, 350 (Pa. 1972), the Pennsylvania Supreme Court determined the gross error requirement of *McMann* did not mandate a "new or higher standard," but was a "response to the particular facts involved in *McMann*."

Hoffman correctly notes this Court has not provided instruction "as to the method in which the lower courts are to interpret and employ this 'Gross Error Standard.'" Brief in Opp. at 8. However, Hoffman's observation supports the granting of certiorari, not only to instruct the lower courts, but also determine whether *McMann*'s gross error requirement continues in the context of guilty pleas after the advent of *Strickland* and *Hill v. Lockhart*, 474 U.S. 52 (1985).

B. To Establish Prejudice, Hoffman Must Allege And Prove, Based Upon A Reasonable Probability, He Would Have Accepted The State's Offer But For Wellman's Actions

Hoffman initially contends Petitioner is barred from asserting he failed to properly allege he would have pled guilty if not for Wellman's actions because the argument was allegedly raised for the first time in Petitioner's Petition for Rehearing with Suggestion

for Rehearing En Banc. Brief in Opp. at 13. This contention is simply incorrect. Expressly addressing the question of whether Hoffman had demonstrated prejudice by asserting he would have pled guilty if not for Wellman's advice, Petitioner asserted in his first brief before the Ninth Circuit:

> Further, there is no evidence that, even if Wellman had given Hoffman a different interpretation of *Adamson*, the outcome would have been different. When asked if Hoffman would have rejected the state's offer irrespective of his advice, Wellman explained:
>
> > I don't think there is any question, Mr. Anderson, that Max, in my opinion, saw his best procedure to require the State to prove those matters against him. I think he had a sense – you know, I would describe that he was of the old school. He was not, he was not going to snitch on anybody, he was not going to turn on anybody. And if the State charged him, then they needed to prove it.
> >
> > . . . .
> >
> > [H]e needed to see the evidence that the state had in order to satisfy his mind or convince him that yah, maybe there was a case here.

(S.E.R., pp.1775-76.)

Clearly, because Hoffman wanted a trial irrespective of Wellman's understanding of

> Adamson, he cannot establish prejudice because the outcome of the proceeding would not have changed based upon Wellman's advice.

Brief of Respondent-Appellee/Cross-Appellant at 46-47.

Hoffman also contends, "*Hill* does not create a *per se* rule whereby a defendant *must affirmatively state* that but for counsel's unprofessional errors, they would have acted differently." Brief in Opp. at 14 (emphasis in original). Hoffman's contention simply ignores the underlying principle from *Hill*: he must establish prejudice by proving "there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty." 474 U.S. at 59. This necessarily requires that Hoffman affirmatively allege in his petition or elsewhere that, but for Wellman's recommendation, he would have pled guilty and not insisted on going to trial. *Id.* at 60. The concurring opinion in *Hill* further demonstrates there is a pleading requirement that must be met before federal habeas relief can be granted. Justice White opined, "an examination of the record reveals that petitioner alleged sufficient facts to 'show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* at 62 (White, J., concurring). However, addressing the particularity with which prejudice must be pled in the habeas petition, Justice White further explained, "because petitioner failed to allege that his attorney knew about his prior

conviction but failed to inform him of the applicability of the Ark. Stat. Ann. § 43-2829B(3) (1977), I find the petitioner did not allege sufficient facts to entitle him to an evidentiary hearing on his ineffective-assistance-of-counsel claim." *Id.* at 63.

As recognized by the dissenting judges in *Hoffman*:

> If the bar for defective performance is as low as the panel sets it, a showing – that is pleading and proof – of prejudice is absolutely required lest we be forced to find ineffective assistance of counsel in every case where an attorney makes a prediction about law or judges and the prediction turns sour.

App. at 74.

While this Court has addressed numerous ineffective assistance of counsel claims since the advent of *Strickland*, none of those cases have focused upon the requirements for effective assistance of counsel in the context of advising a client to reject a plea offer made by the state. *Hill* involved only a claim of ineffective assistance associated with recommending a defendant **accept** a plea offer; the Court has never addressed the question of effective assistance associated with recommending a plea offer be **rejected**, and has not addressed the issue of effective assistance of counsel in any context of plea offers since *Hill*. This case provides the Court the opportunity to address an important questions of constitutional law that have not been touched upon in any fashion since *Hill*, particularly federal habeas pleading requirements associated

with a claim of ineffective assistance of counsel when a trial attorney recommends a client decline a plea offer submitted by the state.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO RESPONDENT'S MOTION TO VACATE DECISION BELOW AND DISMISS THE CAUSE AS MOOT

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RESPONSE TO RESPONDENT'S MOTION TO VACATE DECISION BELOW AND DISMISS THE CAUSE AS MOOT

COMES NOW, Petitioner, Arvon J. Arave ("state"), by and through his attorney of record, L. LaMont Anderson, and hereby responds to Respondent's Motion to Vacate Decision Below and Dismiss the Cause as Moot.

Respondent Maxwell Hoffman was convicted of first-degree murder and sentenced to death. *See State v. Hoffman*, 851 P.2d 934 (Idaho 1993). After completing state appeals, Hoffman eventually filed a Second Amended Petition for Writ of Habeas Corpus. App. at 84-131. The United States District Court for the District of Idaho concluded Hoffman was entitled to habeas relief on two claims in his petition, resulting in the court ordering the State of Idaho to re-sentence him within 120 days; the court denied relief on all other claims, including ineffective assistance of counsel during plea negotiations and trial. App. at 38-65.

While both parties initially appealed the district court's decision, the state subsequently withdrew its appeal, leaving in place the district court's order granting habeas relief as to Hoffman's death sentence. App. at 7. However, while the Ninth Circuit Court of Appeals affirmed the district court's decision regarding ineffective assistance of counsel at trial, the court reversed regarding ineffective assistance during plea negotiations and ordered the district

court to direct the state to release Hoffman unless "the State offers Hoffman a plea agreement with the 'same material terms' offered in the original plea agreement." App. at 37.

The state sought certiorari from this Court asserting the Ninth Circuit erred in finding both deficient performance and prejudice, Pet. at i-ii, and expressly requesting, "that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be summarily reversed." Pet. at 23. On November 5, 2007, this Court granted certiorari regarding both questions and directed the parties to brief and argue the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"

Hoffman has now filed a Motion to Vacate Decision Below and Dismiss the Cause as Moot, asserting he "no longer seeks or desires the relief ordered by the Court of Appeals with respect to the plea offer," and "wishes to withdraw his claim of ineffective assistance of counsel in connection with plea bargaining and dismiss his appeal on that issue in the Court of Appeals below, in order to proceed with resentencing without further delay."

Because Hoffman wishes to withdraw his claim of ineffective assistance of counsel regarding plea negotiations and vacate that aspect of the Ninth Circuit's decision regarding plea negotiations, the state concurs that this case would be moot upon

vacating the lower court's order because Hoffman's "argument amounts to a decision to no longer seek" the remedy he sought in his second amended habeas petition and ordered by the Ninth Circuit. *Webster v. Reproductive Health Services*, 492 U.S. 490, 512 (1989). Because Hoffman's request is virtually identical to the request made by the state in its Petition for Certiorari – vacating the Ninth Circuit's decision regarding ineffective assistance of counsel during plea negotiations and denying habeas relief as to that claim – there is no case or controversy pending before this Court if the Ninth Circuit's decision is vacated pursuant to Hoffman's motion.

The state respectfully requests that Hoffman's motion be granted and this Court direct the Ninth Circuit to vacate that portion of its opinion relating to ineffective assistance of counsel during plea negotiations and direct the district court to dismiss the relevant portion of Hoffman's second amended petition with prejudice. *Id.* at 513.

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A. J. ARAVE,

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v.

MAXWELL HOFFMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S MOTION TO VACATE DECISION BELOW AND DISMISS THE CAUSE AS MOOT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Maxwell Hoffman moves the Court to issue an order (a) vacating the judgment of the Court of Appeals under review, which required "the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the same material terms offered in the original plea agreement" (Pet. App. 32), and (b) dismissing this cause as moot. In support of this motion, Respondent shows as follows:

1. On March 30, 2002, the United States District Court for the District of Idaho issued a judgment vacating Respondent's sentence of death on grounds of ineffective assistance of counsel with respect to his capital sentencing, and requiring the State of Idaho to conduct resentencing proceedings within 120 days. Pet. App. 38, 65. At the same time, the District Court denied the respondent's claims that he was entitled to additional and further relief on other constitutional grounds, including the relief required by the portion of the Court of Appeals judgment under review in this Court. *See* Pet. App. 39 *et seq.*

2. Both sides appealed the District Court's decision, but "[t]he State subsequently withdrew its cross-appeal, leaving in place the district court's order granting the habeas petition as to the sentencing

phase." Pet. App. 7. The withdrawal of the cross-appeal meant that resentencing proceedings[1] would be required, whatever the outcome of the remaining appeals.

3. On October 23, 2006, trial counsel was appointed by the Third Judicial District Court of the State of Idaho, Owyhee County, to represent Respondent at the District Court-ordered capital resentencing proceedings.[2] That counsel suffered from a conflict of interest, and new counsel was appointed on February 14, 2007. Since that time, new trial counsel has been preparing for resentencing, and a status conference is now set for December 13, 2007, before Idaho Third District Judge Hon. Gregory M. Culet.

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[1] Since the District Court's order, there have been fundamental changes in the Idaho law governing capital sentencing, including the addition of a requirement that juries determine both sentencing eligibility and sentencing. *See* Idaho Code 19-2515.

[2] *See* I.C. 19-2515(5)(c). The Order appointing counsel stated that "[r]ather than wait until such time as this Court receives the final directive from the Federal Court, this Court has determined that it will appoint qualified death penalty trial counsel now to both commence preparation for the eventual return of this case to the trial court level, as well as engage in negotiations with the Owyhee County Prosecutor (and possibly with the Idaho Attorney General, if the Attorney General is still assisting the Owyhee County Prosecutor at the trial level) regarding reaching a possible settlement of the case." Order of October 23, 2006 at 1-2 (copy attached to this Motion as Exhibit 1).

4. Although these state proceedings are ongoing and Respondent's sentence of death has been ordered vacated by the United States District Court, he remains confined under "death-sentenced" conditions.[3] These conditions are so onerous that they are the subject of an Eighth Amendment challenge filed on Respondent's behalf in the United States District Court for the District of Idaho. *Hoffman v. Killeen et al.*, CV 02-291-S-BLW. Despite the pendency of his civil action and the state court resentencing proceedings, Idaho Corrections practices require that Respondent continue to be confined under these harsh conditions at least until the resolution of the present proceedings in this Court and the entry of final judgment in the District Court.

5. After extensive consultations with counsel, Respondent has decided that he no longer seeks or desires the relief ordered by the Court of Appeals with respect to the plea offer. He therefore wishes to withdraw his claim of ineffective assistance of counsel in connection with plea bargaining and dismiss his appeal on that issue in the Court of Appeals below, in order to proceed with resentencing without further delay. He therefore requests an order

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[3] Mr. Hoffman's "death-sentenced" status means that his conditions, though not "death row," permit only 2-4 hours per day out-of-cell time and preclude access to the ball field and a kitchen job. These conditions are inconsistent with, and more restrictive than, his actual custody level at which he would be placed at the medium security facility.

promptly vacating this aspect of the Court of Appeals' judgment. Respondent's trial and habeas counsel fully concur with his decision.

6. Because Respondent agrees with and requests exactly the same relief now sought by the petitioner in this matter, the parties are in agreement regarding the proper disposition of the case, and there is no live case or controversy before this Court. Under such circumstances, dismissal is appropriate, with instructions to the lower courts to dismiss, with prejudice, the relevant claim. *Webster v. Reproductive Health Services*, 492 U.S. 490, 512 (1989); *Deakins v. Monaghan*, 484 U.S. 193, 200-01 (1988); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

For all these reasons, Respondent asks the Court to issue forthwith an order (1) vacating that portion of the Court of Appeals decision below which required the District Court to grant the writ unless the State offers respondent a plea agreement (Pet. App. 32); (2) instructing the lower courts to dismiss those portions of Respondent's petition and appeal which seek that relief, with prejudice; and (3) dismissing this case as moot.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF IDAHO

JOAN M. FISHER
Attorney for Respondent

EXHIBIT 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

THE STATE OF IDAHO, Plaintiff, vs. MAXWELL HOFFMAN, Defendant.	CASE NO: CR-4843 ORDER APPOINTING DEATH PENALTY-QUALIFIED TRIAL COUNSEL (Filed Oct. 23, 2006)

Comes now to the above entitled Court and notes as follows:

1. The defendant in the above-entitled cause has previously been sentenced to death.

2. There are various appeals currently pending in the Federal 9th Circuit, but both the state and the defense acknowledge that at the minimum, this case will be returned by mandate to this Court for a new trial on the issue of the sentence, which will include a jury determination of whether the death penalty is appropriate.

3. Rather than wait until such time as this Court receives the final directive from the Federal Court, this Court has determined that it will appoint qualified death penalty trial counsel now to

both commence preparation for the eventual return of this case to the trial court level, as well as engage in negotiations with the Owyhee County Prosecutor (and possibly with the Idaho Attorney General, if the Attorney General is still assisting the Owyhee County Prosecutor at the trial level) regarding reaching a possible settlement of the case.

Accordingly, this Court appoints Van Bishop, who has been qualified and listed in the Idaho Supreme Court list of qualified death penalty trial counsel, to serve as lead counsel at the trial level of the above-entitled cause. At such time as this case is actually returned to the Court for re-trial of the issue of sentence, and if at such time there is no settlement reached in this matter, the Court will consider appointing death penalty qualified co-counsel. Until such time, trial counsel is free to confer with the defendant's appellant counsel, Ellison Matthews, and Federal Public Defender Joan Fisher.

Mr. Bishop shall be compensated at the rate of $125.00 per hour.

At the present time, the Court anticipates the primary effort of lead trial counsel will be involved in negotiations with the prosecuting attorney to attempt to arrive at a possible settlement of this matter. Obviously, if no settlement is reached, the Court anticipates thereafter appointing a mitigation

specialist to assist the defense in preparation for the re-sentencing in this case.[1]

BE IT SO ORDERED this 23 day of October, 2006.

/s/ Gregory M. Culet
Gregory M. Culet District Judge

CERTFICATE [sic] OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 23rd of October, 2006.

Lawrence Wasden
Idaho Attorney General

L. LaMont Anderson
Chief, Capital Litigation Unit
Idaho Attorney General's Office
Criminal Division
P.O. Box 83720
Boise, Idaho 83720

Dennis Benjamin
Attorney at Law
P.O. Box 2772
Boise, Idaho 83701

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[1] It should further be noted, however, that depending on the outcome of all present appeals in the 9th Circuit, a re-sentencing trial may not be necessary.

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Attorney at Law
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Matthew Faulks
Owyhee Co. Pros. Atty.
(placed in basket)

/s/ Trina Aman
Deputy Clerk

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No. 07-110

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

A.J. ARAVE, WARDEN
Petitioner,

vs.

MAXWELL HOFFMAN,
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN (P 24381)*
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Is a defendant convicted at a fair trial or sentenced at a fair sentencing proceeding entitled to any relief if counsel performed deficiently during plea negotiations with the government?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

A. The Assumption of the Existence of Authority by the Circuit Court

The circuit court, after finding deficient performance by counsel, a matter well addressed by petitioner, to whom amicus defers on the matter, assumed it had the authority to direct a particular remedy:

> A habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred."...Where a defendant is deprived of the opportunity to make a reasoned decision about a proffered plea agreement, the proper remedy is reinstatement of the offer of the plea agreement. . . .we order the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the "same material terms" offered in the original plea agreement.
>
> Hoffman v Arave, 455 F.3d 924,942-943(CA9,2006) (emphasis supplied).

Judge Bea, joined by six other members of the court, cogently analyzed the defects of the panel's decision in his opinion dissenting from the denial of rehearing en banc. See Hoffman v Arave,, 481 F.3d 686 (CA 9, 2007)(opinion dissenting from denial of rehearing en banc). Amicus agrees fully with that analysis. But this Court has directed that the parties also address "what, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial," and it is this

important issue to which amicus will focus its attention, for that the judicial branch has the authority to compel the executive branch to take the sort of action ordered in the instant case and cases like it—including the executive branches of state governments—is not self-evident.

B. There Is No Right To A Plea Bargain, and the Reversal Of An Otherwise Valid Conviction and Direction to the Executive Branch to Again Offer a Plea Concession Previously Rejected (Or Not Conveyed to the Accused) Violates Principles of Separation of Powers

The issue presented here generally arises in a different context; namely, where the claim is raised that defendant's counsel failed to convey to the defendant a plea offer advanced by the government, the claim being advanced after conviction at trial. The doctrine has developed that federal courts have the power and proper authority to direct the executive prosecuting agency of both the federal government and state governments to again offer the plea not communicated, and, implicitly in the rulings, to abide by defendant's decision to accept that offer which the government may not now withdraw, though the plea has not yet been entered, upon proof that the defendant "would have" taken the plea offer had he or she been informed of it. But nowhere is the authority to so order about the executive branches of federal and state governments made clear. This is because such authority does not exist; further, where a fair trial or fair sentencing has occurred, no constitutional injury has occurred that requires a remedy.

(1) There is no right to a "well-negotiated" plea

The right protected by due process, and by the Sixth Amendment guarantee of counsel in criminal prosecutions applicable to the States through the due process clause, is the right to a fair trial. And so this Court has found that where counsel's performance is so deficient as to justify a finding that but for that performance the accused would not have given up his or her right to a fair trial by pleading guilty, that plea may be set aside. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The question here, however, concerns the converse, and because the very right protected by the constitution is the right to a fair trial, no wrong that requires remedy can be said to occur when the accused is convicted at a fair trial, even where he or she receives poor counsel regarding a possible plea (or where counsel fails to convey a plea offer).

This Court has said clearly that the right protected by the effective-assistance component of the right to counsel is the right to a fair trial:

> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.
>
> Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 2063 (U.S.1984)

Counsel is crucial to our adversarial system precisely because "access to counsel's skill and knowledge is

necessary to accord defendants the 'ample opportunity to meet the case of the prosecution" to which they are entitled." Strickland, 466 U.S. 6 at 685, 104 S.Ct. at 2063. Where counsel's performance both before and during trial was adequate under Strickland to provide that ample opportunity to meet the prosecution's case, the inquiry should be at an end, the defendant having received that assistance the Constitution affords to ensure the trial was a fair adversarial search for the truth involved in the matter.

The precise issue here—whether "deficient" performance in plea negotiations, such as by poor advice, or the failure to convey to the accused an offer made by the prosecution is mooted by a conviction at a fair trial—has been addressed by lower courts on several occasions, with conflicting results. Representative of those courts answering in the negative (and assuming power to order the executive officials to again offer concessions for a plea, concessions that are well-nigh unwithdrawable, and which, in any event, cause the overturning of a conviction had at a fair trial) is United States v. Day 969 F.2d 39, 45 (C.A.3,1992). There the court cited to decisions by other circuits and state courts (see 968 F.2d at 44, and fn 7) to conclude that "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." See also such cases as Nunes v Mueller, 350 F.3d 1045 (CA 9, 2003) to the same effect.

This ipse dixit will not do, and is inconsistent with Strickland. It is based upon principles of professionalism—"[i]t would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards," see United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438

(C.A.N.J., 1982)—with are conflated with the Sixth Amendment guarantee. But the Court does not sit to enforce rules of professional conduct. And these decisions not only, as will be argued, order remedies inconsistent with principles of separation of powers and federalism, but require resolution of factual questions almost impossible to resolve with any precision ("Because we conclude that prejudice is theoretically possible, the question becomes whether Day alleges sufficient prejudice in fact, which requires consideration of whether Day would have accepted the alleged plea offer and whether the district court would have approved it," Day, supra, 969 F.2d at 45).

The contrary to this proposition (itself contrary to Strickland) is cogently and powerfully stated by Judge Easterbrook in United States. v. Springs, 988 F.2d 746, 749 (CA 7,1993):

> Not every adverse consequence of counsel's choices is "prejudice" for constitutional purposes. "[A]n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. 364, ----, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993)....The guarantee of counsel in the sixth amendment is designed to promote fair trials leading to accurate determinations of guilt or innocence. The Constitution does not ensure that lawyers will be good negotiators, locking in the best plea bargains available....The "prejudice" component of ineffective assistance "focusses on the question whether

> counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair.... Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Fretwell, 506 U.S. at ----, 113 S.Ct. at 844. Prosecutors need not offer discounts and may withdraw their offers on whim. Defendants have no substantive or procedural right to bargain-basement sentences. Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) (emphasis supplied).

And there are decisions reaching the opposite conclusion from Day and similar decisions. In State v Greuber, 165 P.3d 1185, 1189 (Utah, 2007), to which amicus will return, the court held that the defendant there could not have been prejudiced by the performance of his counsel during plea negotiations "because he received a trial that was fair—the fundamental right that the Sixth Amendment is designed to protect." Because there "is no right to a plea offer or to a successful plea bargain," the defendant has lost not a right but an "opportunity, one which may present itself to some defendants but not to others." When a defendant has been then convicted at a fair trial, "he has not been deprived of a 'substantive or procedural right to which the law entitles him.'" Greuber, at 1189-1190, quoting Lockhart v Fretwell; see also cases cited at fn 5.

Precisely so. This Court should hold that no "effective assistance" inquiry regarding plea

negotiations is pertinent after a conviction resulting from a fair trial.

(2) No "remedy" can be imposed for deficient performance during plea negotiations that does not interfere with principles of separation of powers

There is, as observed by Judge Easterbrook in Springs and stated by this Court in Mabry v Johnson, no right to a negotiated plea. Executive-branch prosecuting authorities are not required to make any concessions in order to obtain a guilty plea, and even if they do so, and the defendant accepts the terms, that offer may be withdrawn until such time as the plea has been accepted by the court, or detrimental reliance of a concrete sort—such as the giving of testimony against an accomplice—has occurred. See Mabry; United States v Springs, supra. The decision to charge and the choice of charges are executive decisions, with which the judiciary may not interfere nor superintend. Review of these decisions is not, for example, for abuse of discretion, but only for abuse of power; that is, as to whether the prosecuting authority has exercised its power unconstitutionally by engaging in selective prosecution based on invidious discrimination. See e.g. United States v. Severino, 316 F.3d 939, 955 (CA 9, 2003)("'separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right.' United States v. Palmer, 3 F.3d 300, 305 (9th Cir.1993). Indeed, absent such a showing, 'we have no jurisdiction to review prosecutors' charging decisions ....' United States v. Oakes, 11 F.3d 897, 899 (9th Cir.1993)"); People ex rel. Leonard v. Papp, 386 Mich. 672, 684, 194 N.W.2d 693, 699 (Mich. 1972) ("For the judiciary to claim power to control the

institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers").

The Ninth Circuit here, as other courts have done in related situations, has determined that it should order relief so as to "put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred." But this is not possible, for that "position" included a position occupied by the State—a pretrial posture, where the State was willing to exchange the expense and uncertainty of a trial for a certain conviction, albeit on lesser charges. That ship has sailed, and cannot be recalled. As the Utah Supreme Court pointedly observed in Greuber, once the offer has not been taken, and the defendant has received "his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity," for the "balance of risks and incentives on both sides that existed prior to trial" cannot be recreated, see Greuber, 165 P.3d at 1190—and the attempt to do so engaged in here itself violates constitutional principles of separation of powers (and here, because habeas corpus is involved, federalism).

The prosecution was required to make no plea offer in the first place (as is true in similar cases, including those where the failure of counsel is to inform the accused of the plea offer). Having made it, even if defendant accepted it, before its formal acceptance by the court the prosecution was free to withdraw it, even on, as Judge Easterbrook noted in Spring, a "whim," so long as some detrimental reliance in the form of some performance had not occurred. But the Ninth Circuit here, and it is far from alone in this procedure, requires the state executive prosecuting officials to offer the bargain

again, something they have no interest in doing, implicitly requiring them not to withdraw it now though as an initial matter they were free to! (some courts allow the prosecution to withdraw the offer on proof the withdrawal is not "vindictive," see e. g. Turner v State of Tennessee, 940 F.2d 1000 (CA 6, 1991), in which case there will be a second trial for no reason whatever, and which is inadequate to protect the government's interests, which simply are not the same after the trial—which the plea offer sought to avoid—has been had). These courts thus direct the manner in which the executive branch is to act—requiring a plea offer, and requiring it not be withdrawn if accepted by the defendant—when those decisions belong to the executive branch of government, and those orders could not be issued by a court in the first instance. This Court should firmly set its face against this encroachment on executive-branch authority, and, in habeas cases, the authority of the several States.[1]

C. Conclusion

It is difficult to state the matter more trenchantly than did the Utah Supreme Court:

> The unavailability of a rational remedy for ineffective assistance of counsel in the rejection of plea offers illustrates the flaws inherent in treating identically defendants who have received fair trials and those who had forgone trials and pled guilty. Judges

---

1. The rule expressed by the 9th and other circuits would even prevent prosecuting authorities from placing time limits on plea offers, for if the offer was not conveyed by counsel to his client in a timely fashion, that "failure" would prevent the prosecution from withdrawing the offer. This state of affairs should not exist.

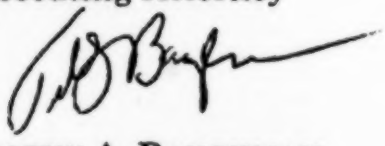
> have long held themselves apart from the complex negotiations that characterize the plea bargaining process and have instead focused on their duty to ensure that defendants receive the fair trial to which they are constitutionally entitled.
>
> 165 P.3d at 1190.

The defendant received a fair trial, whatever the performance of his counsel during plea negotiations. To vacate his conviction and sentence and require that the State offer a plea it is no longer wishes to violates separation of powers and federalism principles. There is no constitutional wrong to be righted here, and an invasion of the executive authority of the State is not proper.

Conclusion

WHEREFORE, this Court should reverse the 9TH Circuit Court of Appeals.

KYM L. WORTHY
Wayne County
Prosecuting Attorney



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